(32,433)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1926.

No. 866

BLACK AND WHITE TAXICAB AND TRANSFER COMPANY, PETITIONER,

vs.

BROWN AND YELLOW TAXICAB AND TRANSFER COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY

BLACK AND WHITE TAXICAB AND TRANSFER COMPANY,
Appellant,

vs.

BROWN AND YELLOW TAXICAB AND TRANSFER COMPANY
Appellee

BILL OF COMPLAINT—Filed December 2, 1925

I

The Plaintiff, Brown and Yellow Taxicab and Transfer Company states that it is a corporation duly organized and existing under the laws of the State of Tennessee and that it is authorized to contract and be contracted with and to sue and be sued under its corporate name, to-wit: Brown and Yellow Taxicab and Transfer Company, and [fol. 2] that it is authorized by the provisions of its charter to carry on a general transfer business for hire and to engage in the business of operating automobiles, trucks, taxicabs, busses, omnibusses or other vehicles for the purpose of carrying, handling and transporting freight, persons, passengers, baggage, express or parcels for hire, from and to points in cities or towns or outside cities and towns and from or to points in the State of Tennessee to or from points in other states and with the right to operate its business in other states of the Union; that its chief office is in the City of Nashville, State of Tennessee, at 904 Russell Street in said city; that it is authorized to carry on its business in the State of Kentucky and that it is engaged in the general transfer business for hire in the State of Kentucky and in the City of Bowling Green in — state under the authority granted by the State of Tennessee which is the home State of the Plaintiff.

II

The Plaintiff states that the Defendant, Louisville & Nashville Railroad Company is a corporation organized

and existing under the laws of the State of Kentucky and as such it is authorized to contract and to be contracted with and to sue and be sued in its corporate name, Louisville & Nashville Railroad Company, and that it is engaged in doing a general transportation business of freight and passengers over lines of railway owned and operated by it in the State of Kentucky and in other states and that it owns, operates, controls and maintains passenger stations and depots among which is the passenger station and depot in the City of Bowling Green, in the State of Kentucky.

III

The Plaintiff states that the Defendant, Black and White Taxicab and Transfer Company is a corporation duly organized and existing under the laws of the State of Kentucky and that it is authorized to contract and to be contracted with and to sue and to be sued in its corporate name, Black & White Taxicab & Transfer Company; that it is engaged in the general transfer business in the City of Bowling Green, Kentucky and carries freight and passengers for hire.

[fol. 3]

IV

The plaintiff states, therefore, that it is a citizen of the State of Tennessee and that it is organized as a corporation under the laws of the State of Tennessee and that the Defendants and each of them are citizens of the State of Kentucky and are organized and existing as corporations under the laws of the State of Kentucky and that there is a diversity of citizenship within the meaning of the laws of the United States in such cases made and provided.

V

The Plaintiff states that the matter in controversy between the Plaintiff on the one side and the Defendants on the other is the value of the rights and benefits belonging to the Plaintiff by reason of a certain contract hereinafter more fully set out, designated and described, and that said value is greater than $3,000.00 exclusive of interest and costs and that if the controversy should be de-

cided against the Plaintiff, its loss would be greater than $3,000.00 exclusive of interest and costs.

VI

The Plaintiff states that on the — day of ——, 1925, it made and entered into a contract and agreement with the Defendant, the Lousiville & Nashville Railroad Company, by the terms of which contract and agreement and for a valuable consideration, the said Defendant granted to the Plaintiff the exclusive right and privilege in so far as it could legally do so, to solicit the handling or hauling of baggage and passengers on the trains of the railroad company and in and around the railroad company's passenger depot and on the surrounding premises, with the privilege of having an agent go into the waiting room or upon the platforms of the Defendant to take orders for transfer of passengers or baggage; that the said Defendant by the terms of said contract assigned to this plaintiff for its use to park its taxicabs and other vehicles of conveyance while awaiting arrival of trains, a plat of ground adjoining the platform on the south end of the station premises and extending southward alongside the public alleyway, and in addition thereto, granted to the said Plaintiff, the right to park its cars on Curd Street in the [fol. 4] City of Bowling Green so long as it did not interfere with public travel, on the south side of said Street between Kentucky Street and the property owned by the said Defendant, Louisville & Nashville Railroad Company; that by the terms of said contract the said Defendant granted to the Plaintiff the exclusive right to park its taxicabs and other vehicles of conveyance on the property of the said Defendant, as well as the exclusive right to solicit business on the grounds and within the depot of the said Defendant, the said business of soliciting to be conducted by the Plaintiff in a respectful manner so as not to cause annoyance, inconvenience or offense to passengers. The Plaintiff states that by reason of said contract it has the exclusive right to enter said depot and grounds of said Defendant and, in an orderly and respectful manner, to solicit business for the Plaintiff and, that no other taxicab or transfer companies and that no other person engaged in

the same or similar business has the right to enter the grounds and depot of the said Defendant and solicit business; that by reason of the terms of said contract the Plaintiff has the exclusive right to park its taxicabs and vehicles of conveyance on the property of the Defendant at the place designated in said contract and that no other person or corporation has the right to so park its taxicabs or vehicles of conveyance on the property of the said Defendant; that by reason of said contract it has the exclusive right to so park its taxicabs and vehicles or conveyance on Curd Street between Kentucky Street and the property of the Defendant Louisville & Nashville Railroad Company, in so far as it may be necessary for the Plaintiff to park on said street, not however, in such a manner as to interfere with the traveling public.

Plaintiff states and charges that the Defendant the Louisville & Nashville Railroad Company has not carried out the provisions of the said contract in that it has allowed and permitted others to enter upon its property and upon the platform and grounds of said depot and solicit passengers and baggage to be transferred by such other persons or corporations, and that it has not protected the Plaintiff in its rights under the terms of said contract and that it has thus allowed the business of the Plaintiff to be interfered with by reason of its failure to keep others from trespassing upon the rights of the Plaintiff as set out in said contract, and that the said Defendant, the Louisville & Nashville Railroad Company has not protected the Plaintiff in its right of exclusive parking privileges on the [fol. 5] grounds of said Defendant as set out in said contract and that it has allowed and permitted others to park taxicabs and other vehicles of conveyance used by such other persons to transfer passengers and baggage on the property of said Defendant, and that such other persons have parked their taxicabs and other vehicles of conveyance on the property of the said Defendant and have thereby interferred with the business of the Plaintiff to the extent that the rights of the Plaintiff under said contract have been seriously interfered with and violated to its great damage; that the said Defendant has not protected the Plaintiff and its right to park its taxicabs and other vehicles on Curd Street in accordance with the terms of said con-

tract, but has allowed others to so park their taxicabs and vehicles of conveyance on Curd Street as to interfere with the rights of the Plaintiff under the terms of said contract. The Plaintiff states that the Defendant, Louisville & Nashville Railroad Company should be compelled by injunction to carry out the provisions of said contract and that it should protect the Plaintiff in the rights granted to it by said contract and should not allow persons other than the Plaintiff to enter upon its grounds, platform and depot and solicit business in competition with the Plaintiff and in opposition to the business of the Plaintiff and that it should be compelled to prevent others using its property for parking taxicabs and other vehicles of conveyance at the place where it has granted to the Plaintiff the exclusive right to so park its taxicabs and other vehicles of conveyance and that it should be enjoined to protect the Plaintiff in its rights to the use of that portion of Curd Street as mentioned and set out in the contract. Plaintiff states that it has no adequate remedy at law as the trespasses are so frequent and continuous that it could not be said that they had ever terminated and that it would result in a multiplicity of suits if Plaintiff should attempt to seek its remedies in a court of law and that it would be difficult to measure the exact amount of damages, and that the failure of the said Defendant to perform its part of said contract will result in a great and irreparable injury to the Plaintiff.

VII

The Plaintiff states that the Defendant, Black & White Taxicab and Transfer Company is engaged in a general taxicab and transfer business in the City of Bowling Green and that in violation of the rights of this Plaintiff granted to it by the terms of the aforesaid contract, the said Defend-
[fol. 6] ant Black & White Taxicab and Transfer Company, through its agents and employees continuously and daily enter upon the property of the Defendant, the Louisville & Nashville Railroad Company near the passenger station in the City of Bowling Green and at the places where the Plaintiff has the exclusive right to solicit business under the terms of said contract, and that the said agents and employees of said Defendant, Black & White Taxicab and

Transfer Company, solicit business on the platform and on the property of the Defendant, the Louisville & Nashville Railroad Company at the passenger station in the City of Bowling Green and that in doing so the said Defendant continuously trespasses upon the rights of the Plaintiff under the terms of the aforesaid contract; that the said Defendant, the Black & White Taxicab and Transfer Company, through its agents and employees often and continuously park and trespass on the property of the Defendant, the Louisville & Nashville Railroad Company near the passenger station in the City of Bowling Green and at the points designated by the said Railroad Company for the Plaintiff to park its taxicabs and vehicles of conveyance and that in doing so the said Defendant, Black & White Taxicab & Transfer Company seriously interferes with the business of the plaintiff; that the said Defendant, Black & White Taxicab and Transfer Company also parks its taxicabs on Curd Street so as to interfere with the operation of Plaintiff's taxicabs and other vehicles of conveyance and that the said Defendant is continuously and without right violating the rights and privileges of the plaintiff under the terms of the aforesaid contract to the great and irreparable injury of the Plaintiff and that Plaintiff has no adequate remedy at law in that such a remedy would result in a multiplicity of suits and would not accord full or adequate relief and that the Plaintiff is, therefore, entitled to an injunction enjoining the said Defendant, the Black & White Taxicab and Transfer Company from thus interfering with the rights of the Plaintiff under said contract.

VIII

The Plaintiff states that by the terms of the said contract which will be filed herewith and made a part hereof marked "Exhibit No. 1" the Plaintiff was to have the exclusive right herein set out for the full period of one year with the privilege of continuing said contract in force thereafter from year to year until one of the parties to the contract [fol. 7] should give notice of its termination; that there are no legal or reasonable grounds why the said Defendant, Louisville & Nashville R. R. Co. should refuse to carry out the provisions of said contract and protect the Plaintiff in

the rights and privileges granted to it by the terms of said contract; that the said defendant has the power to prevent its co-defendant as well as all others from entering upon its property, platform and depot at the passenger station in the City of Bowling Green and there solicit business in competition with the Plaintiff and in opposition to the Plaintiff's business; that it has the power and right to prevent its co-defendant from parking its taxicabs and other vehicles of conveyance on the property set aside by the said defendant for the use of the plaintiff in parking its taxicabs and other vehicles of conveyance and that it has the right and power to prevent all others from so interfering with the rights and privileges of the plaintiff under said contract; that it has the right and power to prevent its co-defendant as well as others from so parking their taxicabs and other vehicles of conveyance on Curd Street as to interfere with the business of Plaintiff and the rights of Plaintiff under said contract, but notwithstanding its full right and power to protect the Plaintiff, it has failed and refused to do so although requested to do so by the Plaintiff repeatedly and from time to time.

Wherefore the Plaintiff prays this Honorable Court or the judge thereof, to grant a writ of injunction pendente lite compelling the Defendant, the Louisville & Nashville Railroad Company to protect the Plaintiff in the rights and privileges granted to it by the terms of the contract aforesaid in that the said Defendant be compelled by injunction to forbid and prohibit any person or persons other than the plaintiff, its agents and employees from entering upon the property, platform and within the depot of said defendant and its passenger depot in the City of Bowling Green, and from soliciting business in opposition to and in competition with the plaintiff; that it be compelled by injunction to protect the rights and privileges of the Plaintiff under said contract in that it prohibit and forbid any other person or persons from parking their taxicabs or other vehicles of conveyance on its property in the parking space allotted and set apart to this Plaintiff; that it be compelled by injunction to protect the rights and privileges of the Plaintiff under said contract in that it be required to prohibit and forbid any person or persons other than the Plaintiff from parking taxicabs and other vehicles of conveyance on

[fol. 8] Curd Street at the point indicated in said contract so that such parking may interfere with the business or rights of the Plaintiff under the terms of said contract; Plaintiff further prays that this Honorable Court or the judge thereof, issue an injunction pendente lite against the Defendant, the Black & White Taxicab and Transfer Company, enjoining it from entering upon the property or platform or within the depot of the Defendant, Louisville & Nashville Railroad Company, and its passenger depot in the City of Bowling Green, Kentucky, and there soliciting passengers or baggage or business in opposition to or in competition with the Plaintiff; that the said defendants be further enjoined from parking its taxicabs or other vehicles of conveyance upon the property of the Defendant, Louisville & Nashville Railroad Company near the passenger station of said Louisville and Nashville Railroad Company in the City of Bowling Green, Kentucky, at the place allotted to the Plaintiff for parking purposes on the said property of the Defendant; that it further be enjoined from parking its taxicabs or other vehicles of conveyance on Curd Street, described in said contract, at any point or in any manner that would interfere with the rights and privileges of the Plaintiff under the terms of said contract; Plaintiff further prays that upon final hearing said injunction pendente lite against the Louisville & Nashville Railroad Company be made perpetual in its terms as herein prayed for and that the injunction pendente lite upon final hearing be made perpetual against the Defendant, Black & White Taxicab and Transfer Company in its terms as herein prayed for; that said injunction pendente lite remain in full force and effect until this suit is finally disposed of, and finally the Plaintiff prays for its costs and all proper relief.

Thomas, Thomas & Logan, M. M. Logan, Attorneys for Plaintiff.

Duly sworn to by C. M. Clark. Jurat omitted in printing.

[fol. 9] EXHIBITS TO BILL OF COMPLAINT—Filed December 2nd, 1925

EXHIBIT No. 1

This agreement made and entered into this 1st day of October, 1925, by and between the Louisville & Nashville Railroad Company, a Corporation, party of the first part, hereinafter referred to as the "Railroad Company," and the Brown & Yellow Taxicab and Transfer Company, of Bowling Green, Kentucky, a Corporation, organized under the laws of the State of Tennessee, party of the second part, hereinafter referred to as the "Transfer Company."

Witnesseth: That for and in consideration of the covenants herein recited and the considerations moving to the Transfer Company by reason of the business coming into under and by virtue of this contract, it is agreed as follows:

1. That for the privileges hereinafter recited the Transfer Company agrees to pay to the Railroad Company Three Hundred Dollars ($300.00), in monthly payments of Twenty-five dollars ($25.00), for the first twelve (12) months, Thirty dollars ($30.00), per month for the second twelve (12), Thirty-five Dollars ($35.00) per month for the third twelve (12) months, Forty Dollars ($40.00) per month for the fourth twelve (12) months and Fifty Dollars ($50.00) per month for the fifth twelve (12) months and thereafter, unless the Transfer Company shows by its books that the business obtained through this contract does not justify such payments when necessary reductions will be made by the Railroad Company. Payments to be made through the Auditor of Receipts of the Railroad Company on the first day of each month. That the Transfer Company will handle in its passenger conveyances to hotels, residences or hospitals, persons injured on the lines of the [fol. 10] Railroad Company, who are brought to Bowling Green, Kentucky, for medical or surgical treatment; that the Transfer Company will promptly transport free of charge between the Railroad Station at Bowling Green and the uptown offices of the Railroad Company, boxes and packages of stationery and supplies.

2. That the Transfer Company shall at all times have at the Railroad Station available for the accommodation of passengers arriving on trains of the Railroad Company, whether such trains arrive on schedule time or late, a sufficient number of first class up to date Yellow Taxicabs, or automobiles and baggage trucks.

3. That agents and employees of the Transfer Company shall be required to wear a badge, or uniform and present a neat and seemly appearance, while conducting the business of the Transfer Company as aforesaid.

4. That the agents and employees of the Transfer Company shall conduct its business while at the station of the Railroad Company in such orderly and respectful manner as not to cause annoyance, inconvenience or offense to passengers and shall not act as soliciting agents for any hotel, boarding house, restaurant, or other business, nor distribute or circulate any form of advertising matter whatever, nor shall such agents or employees of the Transfer Company while at, in or about the station of the Railroad Company be engaged in any business other than that herein designated.

5. That the Railroad Company shall give and grant unto the Transfer Company (Subject to the conditions and limitations herein after set out) the exclusive right and privilege, insofar as it can legally do so, to solicit the handling or hauling of baggage and passengers on the trains of the Railroad Company and in and around the Railroad Company's Passenger Depot and on the surrounding premises; with privilege to have an Agent go into the waiting rooms or upon the platforms of the depot to take orders for transfer of passengers or baggage.

6. That the Railroad Company for the convenience of passengers on inbound trains, assigns for the use of the Transfer Company to park its taxicabs while awaiting arrival of trains a plat of ground adjoining the platform on the south end of the station premises and extending southward along side the public alley-way, and while like plat at the north end of the station is to be reserved for private vehicles, not including public taxicabs of outside parties, the Transfer Company may, when necessary, use such space [fol. 11] as is not occupied by private motor cars and that

the Railroad Company may change the location of such parking space from time to time as it may deem necessary or advisable.

7. That the Railroad Company shall issue baggage checks in such quantities as may be required by the Transfer Company and hereby empowers said Transfer Company to attach checks to baggage at whatever point, or location it may be delivered to the Transfer Company for delivery to the depot of the Railroad Company; that in all deliveries of baggage, the Transfer Company acts as agent of the owner of any and all baggage so checked until it is delivered to the Baggage Agent at the depot of the Railroad Company and receipted for by their Agent.

8. That in undertaking to so check and deliver baggage the Transfer Company becomes absolutely liable to the Railroad Company for any loss of baggage, or injury, or delay thereto, occurring after the same shall have been checked by the Transfer Company and prior to the time same shall have been delivered to the Baggage Agent of the Railroad Company and receipted for.

9. That in case of failure on the part of the Transfer Company to deliver baggage in time for any particular train, that any loss accruing to the owner of said baggage by reason thereof, shall be borne by the Transfer Company and it is agreed that baggage shall not be regarded as delivered in time for a particular train, unless it is delivered as much as fifteen (15) minutes before departure of that train.

10. That the Transfer Company shall be responsible for any loss or damages or delays of any kind, or any nature, from whatever cause, whether by negligence or accident, and the Transfer Company hereby agrees to hold the Railroad Company harmless from all loss or damage resulting from any cause whatever, occurring at any time after the same shall have been checked by the Transfer Company and prior to the delivery of the baggage to the Baggage Agent of the Railroad Company and receiving receipt therefor,

11. That the Transfer Company shall be liable to the Railroad Company for loss or an injury to baggage occurring on account of access of the employees of the Trans-

fer Company to the platforms and baggage rooms of the Railroad Company for and shall be liable to the Railroad Company for all thefts of baggage by the employees of the Transfer Company having access to the baggage rooms and platforms of the Railroad Company; and said Trans- [fol. 12] fer Company shall be liable as aforesaid, regardless of whether the employees causing the loss or committing the theft were on the premises for the Transfer Company, in obedience to the duty of the Transfer Company, or were there for other purposes.

12. That in case of a concealed loss the Transfer Company shall bear its proportionate part of the loss, the distance the baggage is carried by the Transfer Company to be estimated as twenty-five (25) miles in each case, without regard to the actual distance it is carried.

13. That in case of a loss suffered by the Railroad Company of excess baggage charges to which it would have been entitled except for act of the Transfer Company, or its agents, said loss shall be borne by the Transfer Company.

14. That the filling out of all Railroad checks will be done by a competent person employed by the Transfer Company.

15. That the Transfer Company will make out a waybill in duplicate and also Standard Advice Card, which is to be attached to one piece of each lot of baggage checked so that the Baggage Agent of the Railroad Company can weigh the baggage on the arrival at the depot and if overweight for the number of tickets on which it was checked, the Railroad Company's revenue can be protected by forwarding the baggage to destination under C. O. D. check. One waybill is to be retained by the Baggage Agent of the Railroad Company and the other returned to the Transfer Company as receipt for the baggage.

16. That the Transfer Company when placing checks on baggage will carefully note its outward condition, and if any defects, will make note of same on waybill.

17. That the Transfer Company will in no case attempt to check to destination of ticket Sample Baggage or Personal Baggage, or other articles mentioned in Baggage

Tariff subject to charges for excess weight, excess size, or excess value, such baggage to be claim checked and rechecked to destination and the charges collected by the agent of the Railroad Company.

18. That the Transfer Company will collect from passenger only its own revenue, that is to say, charges for hauling the baggage, the collection of all revenue due the Railroad Company, to be exclusively in the hands of the Baggage Agent of the Railroad Company at Bowling Green and in case of claim for delay to bagged due to check being improperly filled out as to destination, junction points, or routing, the Transfer Company will assume liability and on [fol. 13] correspondence covering such case reaching them, they will communicate with owner direct in regard to settlement.

19. That the Transfer Company will use a B. C. Punch in cancelling all tickets of whatever character on which they check baggage, and will refuse to check baggage on tickets previously cancelled with B. C. Punch.

20. That in the performance of the service herein stipulated, the Transfer Company is acting as an independent carrier and is in no sense the Agent or Representative of the Railroad Company.

21. That the Transfer Company will indemnify and save harmless the Railroad Company from any and all payments of damage caused by the negligence or fault of any of the employees of the Transfer Company and all damages which may accrue to such employees by reason of being on the trains and in the said depot or premises. The Transfer Company shall furnish a good and solvent bond in the sum of Five Hundred Dollars ($500.00) conditioned for the faithful performance of the terms of this contract and for the payment of all damages, charges, or expenses of any kind or nature which the Railroad Company may suffer, or to which it may be put by the failure of the Transfer Company to carry out the terms or provisions of this contract.

22. That this contract shall remain in force for a period of one (1) year from the date of its execution and thereafter for consecutive periods of one year each, until the same shall be terminated by thirty (30) days notice in

writing given by either of the parties of this contract to the other; and it is further understood and agreed that such notice need not be given at such time as to terminate the contract at the end of any such year, but may be given at any time by either of said parties, whereupon this contract shall terminate upon the expiration of thirty (30) days from the date of said notice.

In Witness Whereof, the parties hereto have caused this instrument to be executed by their duly authorized officers upon the date and year first above written. Executed in Duplicate.

Louisville & Nashville Railroad Company. W. P. Hines, General Baggage Agent. D. M. Burckle, Witness. Brown & Yellow Taxicab & Transfer Company. C. M. Clark, President. M. B. Williams, Witness.

[fol. 14] EXHIBIT No. 2

This agreement made and entered into this 1st day of December, 1925, by and between the Louisville & Nashville Railroad Company, a Corporation, party of the first part, hereinafter referred to as the "Railroad Company," and the Brown & Yellow Taxicab and Transfer Company, a Corporation, organized under the laws of the State of Tennessee, party of the second part, hereinafter referred to as the "Transfer Company."

Witnesseth: That for and in consideration of the covenants herein recited and the considerations moving to the Transfer Company by reason of the business coming into under and by virtue of this contract, it is agreed as follows:

1. That for the privileges hereinafter recited the Transfer Company agrees to pay to the Railroad Company Three Hundred Dollars ($300.00), in monthly payments of Twenty-five Dollars ($25.00), for the first twelve (12) months, Thirty Dollars ($30.00) per month for the second twelve (12) —, Thirty-five Dollars ($35.00) per month for the third twelve (12) months, Forty Dollars ($40.00) per month for the fourth twelve (12) months and Fifty Dollars ($50.00) per month for the fifth twelve (12) months and

thereafter, unless the Transfer Company shows by its books that the business obtained through this contract does not justify such payments, when necessary reduction will be made by the Railroad Company. Payments to be made through the Auditor of Receipts of the Railroad Company on the first day of each month. That the Transfer Company will handle in its passenger conveyances to hotels, residences or hospitals, persons injured on the lines of the Railroad Company, who are brought to Bowling Green, Kentucky, for medical or surgical treatment; that the Transfer Company will promptly transport free of charge between the Railroad Station at Bowling Green and the uptown offices of the Railroad Company, boxes and packages of stationery and supplies.

2. That the Transfer Company shall at all times have at the Railroad Station available for the accommodation of passengers arriving on trains of the Railroad Company, whether such trains arrive on schedule time or late, a sufficient number of first class up to date Yellow Taxicabs, or automobiles and baggage trucks.

3. That agents and employees of the Transfer Company shall be required to wear a badge, or uniform and present [fol. 15] a neat and seemly appearance, while conducting the business of the Transfer Company as aforesaid.

4. That the agents and employees of the Transfer Company shall conduct its business while at the station of the Railroad Company in such orderly and respectful manner as not to cause annoyance, inconvenience or offense to passengers and shall not act as soliciting agents for any hotel, boarding house, restaurant, or other business, nor distribute or circulate any form of advertising matter whatever, nor shall such agents or employees of the Transfer Company while at, in or about the station of the Railroad Company be engaged in any business other than that herein designated.

5. That the Railroad Company shall give and grant unto the Transfer Company (subject to the conditions and limitations hereinafter set out) the exclusive right and privilege, insofar as it can legally do so, to solicit the handling or hauling of baggage and passengers on the trains of the

Railroad Company and in and around the Railroad Company's Passenger Depot and on the surrounding premises; with privilege to have an Agent go into the waiting rooms or upon the platforms of the depot to take orders for transfer of passengers or baggage.

6. That the Railroad Company for the convenience of passengers on inbound trains, assigns for the use of the Transfer Company to park its taxicabs while awaiting arrival of trains a plat of ground adjoining the platform on the south end of the station premises and extending southward alongside the asphalt roadway extending to Kentucky Street and while like plat at the north end of the station is to be reserved for private vehicles, not including public taxicabs of outside parties, the Transfer Company may, when necessary, use such space as is not occupied by private motor cars and that the Railroad Company may change the location of such parking space from time to time as it may deem necessary or advisable.

7. That the Railroad Company shall issue baggage checks in such quantities as may be required by the Transfer Company and hereby empowers said Transfer Company to attach checks to baggage at whatever point, or location it may be delivered to the Transfer Company for delivery to the depot of the Railroad Company; that in all deliveries of baggage, the Transfer Company acts as agent of the owner of any and all baggage so checked until it is delivered to the Baggage Agent at the depot of the Railroad Company and receipted for by their Agent.

[fol. 16] 8. That in undertaking to so check and deliver baggage the Transfer Company becomes absolutely liable to the Railroad Company for any loss of baggage, or injury, or delay thereto, occurring after the same shall have been checked by the Transfer Company and prior to the time same shall have been delivered to the Baggage Agent of the Railroad Company and receipted for.

9. That in case of failure on the part of the Transfer Company to deliver baggage in time for any particular train, that any loss accruing to the owner of said baggage by reason thereof, shall be borne by the Transfer Company and it is agreed that baggage shall not be re-

garded as delivered in time for a particular train, unless it is delivered as much as fifteen (15) minutes before departure of that train.

10. That the Transfer Company shall be responsible for any loss or damages or delays of any kind, or any nature, from whatever cause, whether by negligence or accident, and the Transfer Company hereby agrees to hold the Railroad Company harmless from all loss or damage resulting from any cause whatever, occurring at any time after the same shall have been checked by the Transfer Company and prior to the delivery of the baggage to the Baggage Agent of the Railroad Company and receiving receipt therefor.

11. That the Transfer Company shall be liable to the Railroad Company for loss of an- injury to baggage occurring on account of access of the employees of the Transfer Company to the platforms and baggage rooms of the Railroad Company *for* and shall be liable to the Railroad Company for all thefts of baggage by the employees of the Transfer Company having access to the baggage rooms and platforms of the Railroad Company; and said Transfer Company shall be liable as aforesaid, regardless of whether the employees causing the loss or committing the theft were on the premises for the Transfer Company, in obedience to the duty of the Transfer Company, or were there for other purposes.

12. That in case of a concealed loss the Transfer Company shall bear its proportionate part of the loss, the distance the baggage is carried by the Transfer Company to be estimated as twenty-five (25) miles in each case, without regard to the actual distance it is carried.

13. That in case of a loss suffered by the Railroad Company of excess baggage charges to which it would have been entitled except for act of the Transfer Company, or its agents, said loss shall be borne by the Transfer Com-
[fol. 17] pany.

14. That the filling out of all Railroad checks will be done by a competent person employed by the Transfer Company.

15. That the Transfer Company will make out a waybill in duplicate and also Standard Advice Card, which is to be attached to one piece of each lot of baggage checked so that the Baggage Agent of the Railroad Company can weigh the baggage on the arrival at the depot and if overweight for the number of tickets on which it was checked, the Railroad Company's revenue can be protected by forwarding the baggage to destination under C. O. D. check. One waybill is to be retained by the Baggage Agent of the Railroad Company and the other returned to the Transfer Company as receipt for the baggage.

16. That the Transfer Company when placing checks on baggage will carefully note its outward condition, and if any defects, will make note of same on waybill.

17. That the Transfer Company will in no case attempt to check to destination of ticket Sample or Personal Baggage, or other articles mentioned in Baggage Tariff subject to charges for excess weight, excess size, or excess value, such baggage to be claim checked and rechecked to destination and the charges collected by the agent of the Railroad Company.

18. That the Transfer Company will collect from passenger only its own revenue, that is to say, charges for hauling the baggage, the collection of all revenue due the Railroad Company, to be exclusively in the hands of the Baggage Agent of the Railroad Company at Bowling Green and in case of claim for delay to baggage due to check being improperly filled out as to destination, junction points, or routing, the Transfer Company will assume liability and on correspondence covering such case reaching them, they well communicate with owner direct in regard to settlement.

19. That the Transfer Company will use a B. C. Punch in cancelling all tickets of whatever character on which they check baggage, and will refuse to check baggage on tickets previously cancelled with B. C. Punch.

20. That in the performance of the service herein stipulated, the Transfer Company is acting as an independent carrier an dis in no sense the Agent or Representative of the Railroad Company.

21. That the Transfer Company will indemnify and save harmless the Railroad Company from any and all payments of damage caused by the negligence or fault of any of the employees of the Transfer Company and all damages which may accrue to such employees by reason by being on the [fol. 18] trains and in the said depot or premises. The Transfer Company shall furnish a good and solvent bond in the sum of Five Hundred Dollars ($500.00) conditioned for the faithful performance of the terms of this contract and for the payment of all damages, charges, or expenses of any kind or nature which the Railroad Company may suffer, or to which it may be put by the failure of the Transfer Company to carry out the terms or provisions of this contract.

22. That this contract shall remain in force for a period of one (1) year from the date of its execution and thereafter for consecutive periods of one year each, until the same shall be terminated by thirty (30) days' notice in writing given by either of the parties of this contract to the other; and it is further understood and agreed that such notice need not be given at such time as to terminate the contract at the end of any such year, but may be given at any time by either of said parties, whereupon this contract shall terminate upon the expiration of thirty (30) days from the date of said notice.

23. This contract supersedes and cancels all present contracts or arrangements between the parties, but without prejudice to rights accrued thereunder.

In Witness Whereof, the parties hereto have caused this instrument to be executed by their duly authorized officers upon the date and year first above written. Executed in Duplicate.

Louisville & Nashville Railroad Company, by W. P. Hines, General Baggage Agent. Brown & Yellow Taxicab and Transfer Company, by C. M. Clark, President. Witness: G. W. Thompson, General Agent. Witness: L. P. Clark.

[fol. 19] IN UNITED STATES DISTRICT COURT

AMENDED BILL OF COMPLAINT—Filed December 11, 1925

Comes the Plaintiff, the Brown and Yellow Taxicab & Transfer Company and adopts all of the allegations in the original Bill of Complaint contained in paragraph I hereof, as a part of this Amended Bill and makes each and every one of the allegations a part of this Bill the same as if set out and copied in full.

Further comes the Plaintiff and adopts all of the allegatioins set out in paragraph II of said Bill of Complaint, and makes each and every allegation a part of this Amended Complaint the same as if copied in full herein.

Further comes the Plaintiff and adopts all of the allegations set out in paragraph III of the Original Bill of Complaint and makes each and every allegation therein a part of this Amended Bill of Complaint the same as if copied in full herein.

Further comes the Plaintiff and adopts each and every allegation in paragraph IV of the original Bill of Complaint and makes said paragraph a part of this Amended Bill the same as if copied in full herein.

Further comes the Plaintiff and adopts each and all of the allegations in paragraph V of said original Bill of Complaint and makes them a part hereof the same as if copied in full herein.

Further comes the Plaintiff and states that the Diamond Taxicab & Baggage Company, a corporation organized and existing under the laws of the State of Kentucky is a necessary party to this action and that it is authorized to sue and to be sued and to contract and be contracted with in its corporate name; that all of the allegations set out in paragraph VI of the original Bill of Complaint as to the failure of the Defendant, Louisville and Nashville Railroad Company, to protect the rights and privileges of the Plaintiff under the contract mentioned in the original Bill of Complaint, applied to the said Diamond Taxicab & Baggage Company and that the said Diamond Taxicab and Baggage Company is one of the parties mentioned and referred to in said original Bill of Complaint in paragraph VI, as violating the privileges and rights of the Plaintiff under said

contract and it is one of the parties which the Defendant, the Louisville and Nashville Railroad Company, has allowed to park its taxicabs and other vehicles of conveyance at the south end of the depot in Bowling Green, Kentucky, where, by the terms of said contract, the Plaintiff has the exclusive right to park its cars, and that it is one of the [fol. 20] parties referred to in said paragraph VI as having been allowed by said Railroad Company to park its cars along the south side of Curd Street in violation of the rights and privileges of the Plaintiff under the provisions of said contract, and that it is one of the parties whose agents and employees as referred to in said paragraph VI have entered upon the grounds, property, and within the depot of the Defendant, the Louisville and Nashville Railroad Company, and have solicited business in violation of the rights of the Plaintiff under said contract as set out in paragraph VI of said original Bill of Complaint; that the injunction sought against the Defendant, Louisville and Nashville Railroad Company, will affect and be binding on the Diamond Taxicab and Baggage Company, as it is one of the parties who has violated the contract as set out in the original Bill of Complaint.

Further comes the Plaintiff and amends paragraph VII of its original Bill of Complaint and states that the Diamond Taxicab & Baggage Company has violated its rights and privileges under said contract mentioned in the original Bill of Complaint, in the same way and manner and to the same extent that the Defendant, Black and White Taxicab and Transfer Company has violated the rights of the Plaintiff under said contract as set out in paragraph VII of the original Bill of Complaint, and the Plaintiff now adopts each and every allegation made in paragraph VII of the original Bill of Complaint as against the Diamond Taxicab & Baggage Company; that the said Diamond Taxicab & Baggage Company has repeatedly and continuously and from day to day parked its taxicabs and other vehicles of conveyance on the property of the Defendant, Louisville & Nashville Railroad Company, on the parcel of ground just south of the depot on which this Plaintiff was given the exclusive right to park its taxicabs and other vehicles of conveyance, under the terms of said contract, and that it has parked its taxicabs and vehicles of conveyance along the

south side of Curd Street in violation of the exclusive rights and privileges granted to the Plaintiff by the terms of said contract, and that it has violated the rights and privileges of the Plaintiff granted by the terms of said contract, in that it, through its agents and employees, has gone upon the property of the Defendant, Louisville & Nashville Railroad Company and there congregated and solicited business and has gone upon the platforms of the said Defendant Railroad Company and within said depot and about said depot [fol. 21] on the property of the Defendant, Railroad Company and has there solicited business to the great and irreparable injury of the Plaintiff and that it has seriously interfered with the business of the Plaintiff and has caused Plaintiff to lose large sums of money which it was entitled to earn under the provisions of said contract, and that by these unlawful and wrongful acts it has hindered and interfered with the orderly transaction of business guaranteed to the Plaintiff by the terms of said contract and that it is, therefore, a necessary party to this action and that an injunction should be awarded against it, the same as against the Defendant, Black and White Taxicab and Transfer Company.

Further, the Plaintiff adopts each and all of the allegations in paragraph VIII of said original Bill of Complaint as against the Diamond Taxicab & Baggage Company, the same as if they were set out in full herein.

Wherefore, the plaintiff prays this Honorable Court to make the Diamond Taxicab and Baggage Company a party Defendant herein and that a writ of injunction pendente lite be awarded against it the same as against the Black and White Taxicab and Transfer Company and that said injunction shall prohibit the Diamond Taxicab and Baggage Company from entering upon the property or platform or within the depot of the defendant, Louisville & Nashville Railroad Company, or from soliciting business in said depot, upon the property of the Defendant in and about said depot, and that it be further enjoined from parking its taxicabs or other vehicles of conveyance upon the property of the Defendant, the Louisville & Nashville Railroad Company near the passenger station of said Railroad Company in the City of Bowling Green, Kentucky at the place or places alloted to the plaintiff for parking purposes on

the said property of the Defendant and that it further be enjoined from parking its taxicabs or other vehicles of conveyance on Curd Street as described in said contract, or at any point or in any manner that will interfere with the rights or privileges of the Plaintiff under the terms of said contract and that upon final hearing said injunction pendente lite against the Diamond Taxicab and Baggage Company be made permanent and that it be adjudged its costs against said Diamond Taxicab and Baggage Company, as well as all just and equitable relief to which it may be entitled.

Thomas, Thomas & Logan, Attorneys for Plaintiff.
R. C. P. Thomas, Atty. for Plaintiff.

[fol. 22] STATE OF KENTUCKY,
County of Warren, set:

C. M. Clark, being duly sworn, deposes and says that he is President of the Brown and Yellow Taxicab and Transfer Company, the Plaintiff in the above styled action; that he has read the foregoing Amended Bill of Complaint and knows the contents thereof and that same is true of his own knowledge.

C. M. Clark, President Brown & Yellow Taxicab & Transfer Company.

Sworn to before me this 11th day of December, 1925.
Estelle Riber, Notary Public, Warren Co., Ky.

IN UNITED STATES DISTRICT COURT

NOTICE OF MOTION TO DISMISS—Filed December 14, 1925

The Brown & Yellow Taxicab & Transfer Company is hereby notified that the defendant, Black & White Taxicab & Transfer Company, will on Monday, December 14th, 1925, at the Federal Court Room in Bowling Green, Ky., move the Honorable Charles I. Dawson, Judge of the United States District Court for the Western District of Kentucky, to dismiss the Bill of Complaint herein.

Sims & Herdman, Attys. for Black & White Taxicab & Transfer Company.

We, as attorneys for plaintiff herein, hereby accept the within notice and agree that said motion may be entered at the time stated in this notice and set down for a hearing thereafter as soon as possible. This December 12th, 1925, at 2:49 P. M.

Thomas, Thomas & Logan, Attorneys for Plaintiff, Brown & Yellow Taxicab & Transfer Company.

[fol. 23] IN UNITED STATES DISTRICT COURT

MOTION TO DISMISS—Filed December 14, 1925

Comes the defendant, Black & White Taxicab & Transfer Company, and moves this Court to dismiss plaintiff's Bill of Complaint, and for cause says:

First: That plaintiff was not a corporation under the laws of the State of Tennessee at the time of the filing of this action so as to give jurisdiction by reason of diverse citizenship.

Second: That plaintiff, formerly a Kentucky corporation having a similar contract as such with the defendant, L. & N. Railroad Company, dissolved and attempted re-incorporation under the same name in Tennessee for the purpose of bringing this action in this Court and evading the settled law of Kentucky governing the contract sued on, and that this was a collusion and fraud on this Court, and plaintiff's bill should be dismissed under Section 37, Judicial Code.

Third: That the contract sued on and suit filed thereon were executed and filed contemporaneously and the allegations of repeated violations of this contract by the defendant, and trespasses by it as alleged, could not have occurred and this action is premature, unauthorized under the facts of the bill, and should be dismissed.

Fourth: That under the settled law of the State of Kentucky adjudicated in numerous decisions, the contract sued on herein is contrary to public policy, unauthorized by the Railroad Company's charter, monopolistic, null and void, and should be dismissed.

Fifth: The contract sued on is also in violation of Section 214 Kentucky Constitution and Section 818 Kentucky Statutes.

Sixth: The federal courts in matters of this character will adopt as controlling the settled and long established law of the state adjudicated and determined by its supreme court where no federal right or statute is involved.

Wherefore, defendant prays that plaintiff's Bill be dismissed.

Sims & Herdman, Attorneys for Defendant, Black & White Taxicab & Transfer Company.

[fol. 24] IN UNITED STATES DISTRICT COURT

ANSWER—Filed February 11, 1926

The defendant, Black & White Taxicab and Transfer Company, for its answer herein admits that it is a corporation under the laws of the State of Kentucky and engaged in the business of transporting for hire passengers and baggage in the City of Bowling Green, Ky., and is a common carrier and engaged in a similar business to that of plaintiff in this territory. This defendant denies that it has knowledge or information sufficient to form a belief that the plaintiff, Brown & Yellow Taxicab & Transfer Company, is a corporation organized or existing under the laws of the State of Tennessee, or that it is authorized to contract or be contracted with, or to sue or be sued under its alleged corporate name, Brown & Yellow Taxicab & Transfer Company; or that it is authorized by the provisions of its charter to carry on a general transfer business from or to points in the State of Tennessee or other states of the Union; or that it has a chief office in the City of Nashville, State of Tennessee, at 904 Russell Street in said City, or that it is authorized to carry on its business in the State of Kentucky, or in the City of Bowling Green under its said alleged corporate authority. But this defendant says if said plaintiff is incorporated under the laws of Tennessee,

it is for the fraudulent purpose of obtaining jurisdiction of this court and evading the application of the laws of Kentucky, as will be hereinafter set out.

This defendant further denies that in violation of any rights of said plaintiff granted to it by its alleged contract with its co-defendant, the L. & N. Railroad Company, it has through its agents or employees continuously, daily or at all entered upon the property of the defendant, L. & N. Railroad Company, near its passenger station in the City of Bowling Green, or any other places where the plaintiff has exclusive right to solicit business; denies that said plaintiff has any exclusive right under said contract, or otherwise, to exclusive use of its co-defendant's, the Railroad Company, depot, platform or premises for the purpose of soliciting business or parking its cars; denies that this defendant has continuously, or at all, trespassed on the rights of plaintiff under its alleged contract or otherwise; or that this defendant has often, continuously or at all trespassed on the property of its co-defendant, the L. & N. Railroad Company, at points designated by said Railroad Company to plaintiff for the parking of its taxicabs and [fol. 25] vehicles, or at any other place; denies that it has seriously, or at all, interfered with the business of plaintiff, except such as it had a legal right to do; denies that it has parked its cars on Curd Street in violation of any legal rights of plaintiff, or has interfered with said plaintiff in the operation of said plaintiff's taxicabs or other vehicles; denies it is continuously or without right violating any rights or privileges of the plaintiff, or that said plaintiff is entitled to any rights or privileges under the terms of the contract sued on with its co-defendant, L. & N. Railroad Company; denies that great, irreparable or any injury has resulted to plaintiff, or that plaintiff has no adequate remedy at law for any damage it may sustain; denies that plaintiff is entitled to any injunction against this defendant for interfering with any claim or alleged rights of said plaintiff under a contract with the L. & N. Railroad Company.

This defendant further answering denies that by said alleged contract, the plaintiff has any exclusive rights for a full period of one year, or any time, to solicit business on the L. & N. Railroad Company's premises, or the ex-

clusive rights to park its cars on said premises; denies that the L. & N. Railroad Company by reason of said contract, or otherwise, has the power to deny this defendant equal privileges and advantages with the plaintiff in the parking of cars or soliciting business, or any business connected with its business as a common carrier on its premises, depot or platform, or that said L. & N. Railroad Company has the power to prevent this defendant from entering upon its property, platform or depot at its passenger station in Bowling Green, Ky., to solicit business in competition to plaintiff, or in opposition to plaintiff's business, or that it has power or right to prevent this defendant from parking its taxicabs or other vehicles or conveyances on the property claimed to have been set aside to plaintiff by said Railroad Company for the use of plaintiff's taxicabs and other vehicles; denies that said Railroad Company has the right or power to prevent this defendant from interfering in a proper and orderly manner as competitor with plaintiff's business, or that said Railroad Company has the right or power to prevent this plaintiff from parking its taxicabs or other vehicles on Curd Street so as to interfere with the business of plaintiff or any alleged rights of plaintiff, but that this defendant is entitled to equal rights and privileges with said plaintiff in the use of its co-defendant's, the L. & N. Railroad Company, premises, depot and platforms and [fol. 26] grounds in legitimately carrying on this defendant's business.

Paragraph II

This defendant further alleges that the plaintiff, Brown & Yellow Taxicab & Transfer Company, was before and at the time of the execution of the contract sued on herein, a Kentucky corporation, resident and doing business in Bowling Green, Warren County, Ky.; that in order to evade the settled law of the State of Kentucky and for the purpose of getting the matter out of the jurisdiction of the state courts after the execution of the contract sued on, it dissolved as a Kentucky corporation and claims to be reincorporated under the same name in the State of Tennessee, but continuing its business as heretofore in Bowling Green, Ky., and that it brought this action in this court on the ground of diverse citizenship and in the hopes of evading the long

settled and well established law of the State of Kentucky avoiding such contracts as the plaintiff is now seeking to enforce, and that this arrangement and alleged incorporation in the State of Tennessee for the purpose of this suit was collusive and a fraud upon this court, and that this action should be dismissed as a collusive and fraudulent suit and as provided under Section 37 of the Federal Judicial Code.

Paragraph III

The defendant says further that the contract sued on and sought to be enforced herein is contrary to the public policy and the settled law of the State of Kentucky as enunciated in numerous decisions of its supreme court, and is monopolistic and in excess of the authority granted its co-defendant, the L. & N. Railroad Company, in its charter from the State of Kentucky, and that said contract is unwarranted, null and void and unenforceable against this defendant.

Defendant further alleges that said contract sued on is also violative of Section 214 of the Constitution of the State of Kentucky, and Section 818 of the Kentucky Statutes providing contracts by railroads and common carriers granting exclusive and preferential rights or advantages to anyone in matters connected with its business as a common carrier. Defendant says that it is entitled under the laws of the [fol. 27] State of Kentucky to equal rights, privileges and advantages with the plaintiff in the use of defendant's Railroad Company, depot, platform and premises, and the streets adjacent thereto, and any denial or interference with this right or privilege is illegal and unwarranted, and said defendant, Railroad Company, has no right to discriminate against this defendant in favor of plaintiff in the use of its premises.

Paragraph IV

This defendant further answering states it is a well established and settled rule and policy of this and other federal courts to adopt as controlling on them the well settled law as determined by the supreme court of the state in matters of contract involving public policy such as arise in this action, and where no expressed federal right or

statute is involved. And it is also the well settled rule and policy of this and similar courts to give due regard and effect to the valid statutes and constitutional provisions of the state affecting the questions arising herein, both for reasons of comity, and also to avoid a direct conflict of decisions and the confusion caused therefrom.

Defendant says that in view of the well settled and established adjudications of the Court of Appeals of the State of Kentucky in the matters involved herein and the policy and rule heretofore stated of this court to follow adjudications as the law and controlling on it, that plaintiff's Bill of Complaint herein should be dismissed.

Wherefore, this defendant prays that plaintiff's Bill of Complaint be dismissed and for its costs against plaintiff, and all proper and equitable relief.

Sims & Herdman, Attorneys for Black & White Taxicab & Transfer Company.

Duly sworn to by W. T. Renfrow. Jurat omitted in printing.

[fol. 28] IN UNITED STATES DISTRICT COURT

FINAL JUDGMENT—Filed June 30, 1926

Each party, by attorneys, being present in court consent that this cause may be finally heard on the record as made up on the motion for a preliminary injunction, and neither party desiring to introduce additional evidence, and this cause having been submitted for final judgment on the record as made up on the motion for preliminary injunction, and the court being advised finds as conclusion of fact:

1. The plaintiff, Brown & Yellow Taxicab and Transfer Company, and the defendant, Louisville & Nashville Railroad Company, entered into the contracts filed with and made a part of the Bill of Complaint.

2. The plaintiff was guilty of no fraud on the jurisdiction of the court by reason of its having re-incorporated in the State of Tennessee as a Tennessee Corporation for the purpose of having its litigation in Kentucky tried in the Federal Court.

3. The allegations of the Bill of Complaint and Amended Bill of Complaint, that the defendant, Black & White Taxicab and Transfer Company, and other persons engaged in the taxicab and transfer business in the City of Bowling Green, have violated the rights and privileges of the plaintiff under the provisions of said contract, are true.

4. The Louisville and Nashville Railroad Company has not consented or permitted the Black and White Taxicab and Transfer Company or other persons engaged in the [fol. 29] taxicab or transfer business to violate the rights and privileges of the plaintiff under the provisions of said contract, and neither has it prevented the said taxicab companies and others from violating the provisions of said contract.

The Court finds as conclusions of law:

1. That the Court has jurisdiction of the parties to this suit and of the subject matter thereof.

2. That plaintiff is entitled to the relief prayed for in its Bill of Complaint against the Black and White Taxicab and Transfer Company who has violated the rights and privileges of the plaintiff under the provisions of its contract with the Louisville and Nashville Railroad Company.

3. That the contract between the Brown and Yellow Taxicab and Transfer Company and the Louisville and Nashville Railroad Company filed with and made a part of the Bill of Complaint, is a valid contract.

Wherefore, it is now by the Court adjudged, ordered and decreed as follows, to-wit:

1. That the motion of the defendants aforesaid to dismiss the Bill of Complaint is overruled.

2. It is hereby ordered, adjudged and decreed that the plaintiff herein be, and it is hereby awarded a writ of permanent injunction against the defendant, Louisville and Nashville Railroad Company, and it and its agents and servants, and all persons acting by or under its authority and direction be, and they are hereby restrained and permanently *ad*joined from consenting that the Black and White Taxicab and Transfer Company, or the agents or

employes of it, or any other person or persons engaged in the taxicab business or the transfer business, may enter upon the grounds and property of the defendant, Louisville and Nashville Railroad Company, at its depot in the City of Bowling Green, or within said depot or upon the platforms of said depot and there solicit the carriage of passengers and baggage, or to park their taxicabs or other vehicles of conveyance on the property of the defendant Louisville & Nashville Railroad Company, at its depot aforesaid in the parking space allotted to and set apart to the plaintiff, except that said taxicab company and other persons engaged in like business, may be permitted to go upon the property of the defendant, Railroad Company, to deliver passengers or baggage or to go upon the property of said defendant or within its said depot in order to receive passengers or baggage as to which they have made a prior contract.

[fol. 30] 3. It is hereby further ordered, adjudged and decreed that the plaintiff herein be and it is hereby awarded a writ of permanent injunction against the defendant, Black & White Taxicab and Transfer Company, and the agents and employees of said company, and the said defendant is hereby permanently enjoined from going within the depot of the defendant, Louisville & Nashville Railroad Company, in the City of Bowling Green, or upon the grounds and property of the Louisville and Nashville Railroad Company adjacent to said depot for the purpose of soliciting business in opposition to the plaintiff herein, and further the said taxicab company is permanently enjoined from parking its taxicabs or other vehicles of conveyance on the grounds of the defendant, Railroad Company, adjacent to said depot, except however, that the defendant, Taxicab Company may go upon the grounds of the said Railroad Company to deliver passengers or baggage and may go within said depot or upon the grounds of said Railroad Company to receive passengers or baggage as to which it has made prior contracts, but in so doing it shall not park its cars on the grounds of the Railroad Company or remain within the said depot longer than is reasonably necessary to discharge said passengers or baggage, or to receive passengers or baggage as aforesaid.

4. The defendant, the Black and White Taxicab and Transfer Company, is further enjoined from using Curd Street in the City of Bowling Green, leading from the northwest side of the line of Birnam's Alley extended across Curd Street to Kentucky Street, in such a manner as to unreasonably obstruct ingress and egress to and from the depot grounds, or to unreasonably obstruct ingress and egress of plaintiff's taxicabs or other vehicles; to and from the parking space allotted to the plaintiff by the terms of said contract, or the ingress and egress of plaintiff's taxicabs and vehicles from Curd Street to the depot or to the streets and grounds adjacent thereto. Otherwise, the motion for an injunction against the defendants concerning the exclusive rights of plaintiff to park its cars on Curd Street, is denied.

5. The writ of injunction herein awarded shall remain in full force and effect for all time and is now made permanent by this Court.

This injunction shall not become effective until plaintiff executes bond to the defendants in the usual form in the sum of $3,000.00 with surety to be approved by the Clerk.

[fol. 31] To all of the foregoing findings, orders and decrees, the defendant, Black & White Taxicab & Transfer Company, excepts.

Chas. I. Dawson, Judge.

In United States District Court

Agreed and Condensed Statement of Evidence—Filed June 30, 1926

The complainant and defendants have agreed and do hereby agree that the matters and things hereinafter set out shall constitute the condensed statement of testimony in the above entitled cause, and that all the affidavits were properly signed and sworn to according to law and that all the witnesses were duly sworn according to law.

The complainant to maintain the issues on its behalf introduced the following evidence.

The complainant offered and read in evidence the joint affidavit of C. M. Clark and L. P. Clark, which is as follows, to-wit:

Affidavit of C. M. Clark and L. P. Clark

The affiants, C. M. Clark and L. P. Clark, state that they are the President and Secretary, respectively, of the Brown & Yellow Taxicab and Transfer Company, the plaintiff herein, and that they are, therefore, familiar with the allegations of the Bill of Complaint and the facts therein set out. They state that the plaintiff entered into the contract referred to in the Bill of Complaint with the Louisville and Nashville Railroad Company on the first day of October 1925, and said contract is attached hereto and made a part of this affidavit, and that thereafter, to-wit; on the first day of December, 1925, the plaintiff and the defendant, Louisville and Nashville Railroad Company, re-executed said con- [fol. 32] tract with a slight modification in paragraph 6 thereof for the sake of clearness.

These affiants state that the defendant, the Black & White Taxicab & Transfer Company and its agents and employees and others interested in the taxicab and transfer business, have infringed the rights of the plaintiff under said contract, in this, that the said defendant in conjunction with others, have continuously and from day to day parked their taxicabs and vehicles of conveyance on the property of the defendant, Louisville and Nashville Railroad Company, at the south end of the depot, and that they have thereby interfered with the plaintiff in the conduct of its taxicab and transfer business by placing the taxicabs and vehicles of conveyance of said defendant and others, in the way of the taxicabs and vehicles of conveyance of this plaintiff and that they have done this openly and continuously and thereby obstructed and interfered with the rights of the plaintiff in the operation of its business and have thereby prevented the plaintiff from earning money which it would otherwise have earned under the terms of said contract, and that the said defendant, Black and White Taxicab and Transfer Company, and others, are threatening to continue in said violation of the plaintiff's rights and will continue

to do so unless prevented by the orders of this Court; that the said defendant, Black and White Taxicab and Transfer Company and others are claiming the right to thus interfere with plaintiff's rights and privileges under said contract and that they openly and notoriously ignore the contract referred to in the Bill of Complaint, and openly state that they do not have to recognize any right of the plaintiff under said contract.

The affiants further state that the said defendant, Black and White Taxicab and Transfer Company, parks its taxicabs and other vehicles of conveyance along the south side of Curd Street, that is the short street or alley running from Kentucky Street to the property of the defendant, Louisville and Nashville Railroad Company, and that the said defendant, Black and White Taxicab and Transfer Company, and others, continuously and daily so park their taxicabs and that from the property of the defendant, Louisville and Nashville Railroad Company, at the south end of the depot to Curd Street, the defendant, Black and White Taxicab and Transfer Company, its agents and employees, and others engaged in a like or similar business, congregate and solicit the business of the traveling public to such an extent as to interfere with the traveling public and that they [fol. 33] thereby interfere with the rights of the plaintiff under said contract and prevent it from earning money under said contract and that they do this openly and notoriously and assert and state that the contract of the plaintiff is of no effect and that they do not have to recognize it as valid and that the plaintiff has no right or privilege under said contract which they must respect.

Affiants state that the said defendant, Black and White Taxicab and Transfer Company, its agents and employees, and others, enter upon the property of the defendant, Louisville and Nashville Railroad Company, and upon the platform between the depot and the railroad tracks, and there solicit business and that they also go upon the platform of the depot on the opposite side of the railroad tracks and that they there congregate in large numbers and solicit the business of the traveling public and that they thereby hinder and interfere with the plaintiff in the orderly transaction of its business under the terms of said contract, and that they do this daily and continuously and openly state

that the defendant, Louisville and Nashville Railroad Company has not the right or power to keep them off of its property and that it did not have the right or power to enter into the contract referred to in the Bill of Complaint with the plaintiff, and that they openly state that they will recognize no such contract and that they will recognize no order from the defendant, Louisville & Nashville Railroad Company, to keep off of its property when they enter thereon for the purpose of soliciting business and that the said defendant, Black and White Taxicab and Transfer Company and others, have thus interfered with the rights and privileges of the plaintiff under said contract and have deprived it of its opportunity to earn money under said contract and that the said defendant and others will continue to so interfere and hinder the plaintiff in the operation of its business and will continue to cause it to lose money by reason of such interference unless restrained by the orders of this Court.

The affiants state that the defendant, Louisville and Nashville Railroad Company, has not protected it in its rights and privileges under said contract in that it has allowed its co-defendant and others to so congregate upon its property, park its taxicabs and solicit business as herein set out.

C. M. Clark, L. P. Clark.

[fol. 34] Complainant next offered in evidence the judgment of the Warren Circuit Court in the suit of the City of Bowling Green vs. Louisville and Nashville Railroad Company, which is as follows, to-wit:

EXHIBIT

Came the defendant, the Louisville and Nashville Railroad Company, and filed its answer, and this cause being submitted for judgment, and it appearing that the Common Council of the City of Bowling Green passed an ordinance directing the closing of Curd Street from the southeastern edge of the right of way of the defendant to the northwestern boundary of Burnam's Alley and Adams Street from the northern line of Mrs. Sophia G. Winlock's property north to where it terminates in defendant's right of way, be closed, which ordinance was duly approved by the Mayor of said City, and said defendant having filed its

answer herein waiving any claim to damage by reason of the closing of said streets, and this cause being submitted, and the court being advised, it is adjudged that Curd Street from the southeastern edge of the right of way of the Louisville and Nashville Railroad Company to the northwestern boundary of Burnam's Alley and Adams Street from the northern line of Sophia G. Winlock's property north to where it terminates in said Railroad Company's right of way, be closed. Plaintiff shall pay the cost of this action and this cause is stricken from the docket.

Complainant next offered in evidence an ordinance of the City of Bowling Green, which is as follows, to-wit:

EXHIBIT

It appearing to the Council to be to the best interest of the public that Curd Street from the southeastern edge of the right of way of the Louisville and Nashville Railroad Company to the northwestern Boundary of Burnam's Alley be closed and that Adams Street from the northern line of Mrs. Sophia G. Winlock's lot north to where it terminates in the Louisville and Nashville Railroad Company's right of way be closed, therefore,

Be it ordained by the Common Council of the City of Bowling Green:

That Curd Street from the southeastern edge of the right of way of the Louisville and Nashville Railroad Company to the northwestern boundary of Burnam's Alley be closed and Adams Street from the northern lines of Mrs. Sophia G. Winlock's property north to where it terminates in the Louisville and Nashville Railroad Company's right of way be closed, and the City Attorney is directed to institute a suit in the Warren Circuit Court to obtain a decree closing said streets as above provided.

[fol. 35] This ordinance shall take effect from its passage.

Approvd July 2nd, 1923.

H. E. Stone, Mayor.

Attest: Fred Keune, Jr., City Clerk.

Ordinance passed second reading July 2nd, 1923.

Here complainant rests.

The defendant, to maintain the issues on its behalf, introduced the following evidence, which by leave of Court was heard orally:

C. M. CLARK

C. M. Clark testified that he was President of the Plaintiff Brown & Yellow Taxicab & Transfer Company, which was at first a Kentucky corporation with himself, his brothers, L. P. Clark, and R. J. Clark and their wives as incorporators and stockholders; that on or about October 1st, 1925, this Kentucky Corporation was dissolved and the plaintiff corporation formed under the same name on September 24, 1925, in Tennessee, the incorporators being the same as in the Kentucky corporation; that the properties of the Kentucky corporation were turned over to the Tennessee corporation; that otherwise no cash nor real estate was paid for the stock in Tennessee corporation, as the articles of incorporation required; that the corporation has no property in Tennessee nor transacts any business there and that its designated office is in the residence of a brother at No. 904 Russell Street, Nashville, Tennessee, but it keeps no books there, nor has any offices for business there; that it entered into two contracts with the Louisville & Nashville Railroad, one on October 1st, 1925, and another on December 1, 1925, both of which were operated, but there was a slight change made in last contract; that the plaintiff dissolved its Kentucky corporation and reincorporated in Tennessee for protection in this controversy, or any controversy that may arise out of these or any contracts; that the dissolution of the Kentucky Corporation and reincorporation in Tennessee was done through special employment with Rodes & Harlin, who also regularly represent the Louisville & Nashville Railroad Company, as his attorneys, Thomas, Thomas & Logan, were absent from the City, or otherwise busy and could not attend to it.

[fol. 36] In answer to a question by the Court, he testified that the Kentucky Corporation was dissolved as the law required and that his company was conducting its business as a Tennessee corporation and proposed to continue to do so.

W. Y. McGinnis

W. Y. McGinnis testified that he operates the Diamond Taxi Company in Bowling Green; that there has never been any disturbance or complaint to his knowledge of any loud, boisterous conduct, undue soliciting of passengers by any taxi drivers at the railroad station; that he himself does not drive a taxi, but has three cars in daytime and two at night to meet trains; that the plaintiff, Brown and Yellow Taxicab and Transfer Company, has eight or ten, the Black and White Taxicab and Transfer Company has some, he does not know how many, and several independent taxis; that upon being shown a plat made by the City Engineer, he stated that Curd Street extended from Kentucky Street up to Railroad Company's tracks, but was paved by asphalt to end of station; that the Brown and Yellow Taxicab Company was given a special parking space by the Railroad at the south end of the station the width of Curd Street, marked on diagram "Crushed stone, special property of Brown and Yellow Taxi Company;" that the other taxis were required to park in front of a coal yard south of this special space; that cars other than the plaintiff's were required to stand one hundred and twenty-five feet from the main entrance to the station, and fifty-seven feet from the south end of the station and beyond the Brown and Yellow Taxi Company's cars; that Curd Street is a public street some twenty to twenty-five feet in width.

On Cross-examination by Railroad Company's attorneys, witness stated that when informed that the Louisville & Nashville Railroad Company would make an exclusive contract with some taxi company, he met and solicited said contract of Mr. Hines, the Railroad's representative, in an office at the station and was informed by Mr. Hines that to make this contract the Railroad Company would require a bond to protect it from all law suits and damages that may arise from this contract; that the Railroad might be sued and the taxi company getting the contract would have to give bond to fight the suit, and pay all costs and damages; that Mr. Hines told him that the Railroad Company had had one suit and lost it, and he doubted if the contract would [fol. 37] hold, and for that reason they would require a bond to fight the law suit and pay all costs and expenses;

that under these conditions he refused to enter into any contract. When asked by the Court what kind of a suit was this bond to protect, he replied he was told it was to cover damages sustained by any person who entered into the contract.

GEORGE MCALLISTER

George McAllister testified that he is a driver for W. Y. McGinnis and has been a hack and taxi driver for thirty-five years; that he parks McGinnis' cars on Curd Street; that there has been no undue congregating, loud or boisterous conduct or impropr interference with passengers at the L. & N. Railroad Station in Bowling Green and no complaint from L. & N. Railroad Company's police.

On Cross-examination by the Railroad Company's and plaintiff's attorneys, witness testified that sometimes they drove across Burnam's Alley and parked between the alley and the railroad tracks, and had also at times parked in the special space allotted to Brown and Yellow Taxi Company; that they only went on platform when they had orders to meet someone; that he had never seen the Diamond Taxi drivers congregate on south end of platform and up to north of the door; that there are ten thousand people in Bowling Green and about fifteen passenger trains entering and leaving per day; that there are three taxi companies and three or four other persons running taxi cars, making about six in all, with some sixteen to eighteen drivers; that these drivers congregate at south end of platform and solicit passengers by throwing up their hand; that plaintiff, Brown and Yellow Taxi Company, receive their passengers at the main entrance, or front door of the station, and other drivers on Curd Street.

On cross-examination, witness further testified when cross-examined by Railroad Company's attorneys, that the Railroad Company had bought the block between Fourth and Curd Streets and had removed shacks and houses and had erected the station with a driveway and a little park; that Curd Street had been a street for twenty-five years and ran from Kentucky Street to the main track of the Railroad Company; that the City closed Fourth Street, but did not

know of closing Curd Street; that Curd Street ran up to the [fol. 38] railroad tracks and had a gateway originally put there by Ragland; that the Railroad Company had put some side tracks in when they built the station.

CHECK WARREN

Check Warren testified that he is a taxi driver for the defendant, Black and White Taxi Company, and has been driving for two years, and for the plaintiff, Brown and Yellow Taxi Company, for a year and a half of that time; that he had quit plaintiff's service about a week previous to testifying; that he was frequently in the office of the plaintiff and that it got its mail at its office in Bowling Green; that all its cars were in Bowling Green; that it did no business except the taxi business in Bowling Green; that he met all trains in the day time and when working for the plaintiff, Brown and Yellow Taxi Company, received its passengers at the front door of the station, and drivers for other companies received their passengers on Curd Street; that he had noticed no disorder, loud conduct, annoyance of passengers by grabbing grips or otherwise; that drivers for other companies than plaintiff never entered station unless they had engagements.

Upon cross-examination by plaintiff's attorneys, witness testified he had seen no taxi drivers for other companies than plaintiff go around to solicit business between the station and tracks; that now, as driver for defendant, Black and White Taxi Company, he parked on Curd Street; that two taxi drivers had a personal difficulty at the railroad station and were summoned to appear in Police Court.

Defendant next offered in evidence the affidavits of J. H. ACKLEN and HARRY ENNIS, which are as follows, to-wit:

AFFIDAVIT OF J. H. ACKLEN

Being requested to ascertain if the Brown and Yellow Taxicab and Transfer Company had business offices at 904 Russell Street, Nashville, Tennessee, I interviewed the

following persons: Mrs. Carrie M. Watkins, former owner of the property, Mrs. Clarke, wife of the present owner, R. G. Clark, who is an engineer for the Tennessee Central [fol. 39] Railroad, Emmet L. Rye, a boarder in the house No. 904 Russell Street, and who is employed by the George Cole Motor Company of 521 Broad Street, and from the statements made by them to me I state:

That No. 904 Russell Street is a private residence; is not used for business purposes, and that the Brown and Yellow Taxicab and Transfer Company have no offices at No. 904 Russell Street, Nashville, Tennessee.

J. H. Acklen.

AFFIDAVIT OF HARRY W. ENNIS

The affiant, Harry Ennis, states that he is City Engineer of the City of Bowling Green, Kentucky, and that the map and plot of the L. & N. Railroad Company's station, approaches and grounds and spaces attached to this affidavit was made by him and that the same showing location and distances is approximately true and correct.

Harry W. Ennis, City Engineer of the City of Bowling Green.

The complainant and the defendant, Louisville and Nashville Railroad Company, objected to all the foregoing evidence offered by the defendant, Black and White Taxicab and Transfer Company, which objection was overruled by the Court, and to which ruling of the Court the complainant and the defendant, Louisville and Nashville Railroad Company, excepted at the time and still excepts.

And this was all the evidence given in this cause.

Thomas, Thomas & Logan, Attorneys for Complainant. Rodes & Harlin, Attorneys for L. & N. Railroad Company. Sims & Herdman, Attorneys for Black & White Taxicab & Transfer Company.

ORDER APPROVING STATEMENT OF EVIDENCE

The parties having agreed that the foregoing statement is correct the Court now signs and approves the same and orders it made a part of the record.

Chas. I. Dawson, Judge.

[fol. 40] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL AND ORDER ALLOWING SAME—Filed June 30, 1926

The defendant, Black & White Taxicab & Transfer Company, feeling itself aggrieved by the order granting a permanent injunction made and entered in this cause on the 30 day of June, 1926, does hereby appeal from said order to the Circuit Court of Appeals for the Sixth Circuit, for the reasons specified in its Assignment of Errors filed herewith and made a part hereof, and it prays that its appeal be allowed, and that a transcript of the record, proceedings, papers and exhibits upon which said order was based, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Sixth Circuit, sitting at Cincinnati, Ohio. And your petitioner further prays that the proper order touching the security to be required of it to perfect its appeal be made.

Sims & Herdman, Attorneys for Defendant Black & White Taxicab & Transfer Company.

The foregoing petition granted and the appeal allowed upon giving bond conditioned as required by law in the sum of $300.00.

Chas. I. Dawson, Judge.

IN UNITED STATES DISTRICT COURT

ASSIGNMENTS OF ERROR—Filed June 30, 1926

And now on the 30 day of June, 1926, came the defendant, Black & White Taxicab & Transfer Company, by its attorneys, Sims & Herdman, and says that the order and

judgment or decree entered in the above entitled cause on the 30 day of June, 1926, is erroneous and unjust to this defendant because of the reasons following, to-wit:

[fol. 41] First. That said District Court erred in awarding and granting said permanent writ of injunction upon the pleadings and proof heard in this cause.

Second. That said District Court erred in its finding of fact No. 2, that plaintiff was guilty of no fraud on the jurisdiction of the court by re-incorporating in the State of Tennessee as a Tennessee corporation for the purpose of having its litigation in Kentucky tried in the Federal Court.

Third. That said District Court erred in its third finding of fact that the defendant, Black & White Taxicab & Transfer Company, had violated the rights and privileges of plaintiff, Brown & Yellow Taxicab & Transfer Company, under the provisions of the contract sued on.

Fourth. That said District Court erred in its fourth finding of fact and that the defendant, Louisville & Nashville Railroad Company, had neither consented, permitted nor prevented the defendant, Black & White Taxicab & Transfer Company, from violating the rights and privileges of plaintiff under the provisions of the contract sued on.

Fifth. That said District Court erred in its conclusions of law that it had jurisdiction of the subject matter, and of the parties to this suit.

Sixth. That said District Court erred in not deciding, holding and decreeing that the contract sued on was in violation of Section 214 of the Kentucky Constitution and thereby null and void.

Seventh. That said District Court erred in not deciding, holding and decreeing that the contract sued on was ultra vires and in excess of the charter rights of the defendant, Louisville & Nashville Railroad Company, and therefore null and void, as construed and held in similar cases by the Court of Appeals of the State of Kentucky.

Eighth. That said District Court erred in not deciding, holding and decreeing that the numerous decisions of the

Kentucky Court of Appeals, holding similar contracts null and void, should be followed and the law as adjudged by the Kentucky Supreme Court applied to this case.

Ninth. That said District Court erred in not deciding, holding and decreeing that the question involved in this case related to real estate and concerned a rule of property in the State of Kentucky, and that the numerous decisions of the Court of Appeals of Kentucky holding similar contracts null and void should be followed and the law, as adjudged by the Court of Appeals of Kentucky, applied in this case.

[fol. 42] Tenth. That said District Court erred in not holding, deciding and decreeing that the re-incorporation of plaintiff in the State of Tennessee for the admitted purpose of bringing this suit in Federal Court, and evading the well settled law as determined by the Court of Appeals of Kentucky, was a fraud on this Court requiring dismissal of this action under Section 37 Judicial Code.

Eleventh. That the District Court erred in holding that plaintiff was entitled to the relief prayed for in its Bill of Complaint against the defendant, Black & White Taxicab & Transfer Company, and in holding that this defendant had violated any rights or privileges of plaintiff under any valid contract with Louisville & Nashville Railroad Company.

Twelfth. The District Court erred in holding the contract between the Brown & Yellow Taxicab & Transfer Company and the Louisville & Nashville Railroad Company a valid contract.

Thirteenth. The District Court erred in overruling the motion of the defendant, Black & White Taxicab & Transfer Company, to dismiss plaintiff's Bill of Complaint.

Fourteenth. The District Court erred in ordering, adjudging, decreeing and awarding the writ of injunction to plaintiff against the defendant, Louisville & Nashville Railroad Company, restraining it from allowing this defendant, Taxicab Company, equal rights to enter its premises and station and platform, or park its cars with the plaintiff's and as adjudged in Section 2 of its judgment and decree.

Fifteenth. The District Court erred in ordering, adjudging, decreeing and awarding to plaintiff a writ of injunction against this defendant, Taxicab Company, enjoining it from entering the premises, station and platforms of the defendant, Louisville & Nashville Railroad Company, as set out in Section 3 of its judgment and decree, and denying to this defendant equal privileges and rights with plaintiff.

Sixteenth. The District Court erred in extending its injunction against this defendant, Taxicab Company, in any way to Curd Street, a public street of the City of Bowling Green, and making any order with reference to same as set out in Section 4 of its judgment and decree.

Wherefore, said defendant prays that said order and decree be reversed and that said District Court be directed to enter and order overruling the motion for an injunction [fol. 43] and dismissing the Bill of Complaint as prayed by defendant.

Sims & Herdman, Attorneys for Defendants Black & White Taxicab & Transfer Company.

IN UNITED STATES DISTRICT COURT

ORDER GRANTING APPEAL—Filed June 30, 1926

This day appeared the defendant, Black & White Taxicab & Transfer Company, by its attorneys, and tendered its Petition for Appeal and its Assignment of Errors, and it is now ordered that said Petition and said Assignment of Errors be filed, and said Petition for Appeal to the United States Circuit Court of Appeals for the Sixth Circuit from the order entered herein on the 30 day of June, 1926, be and the same is now allowed upon the execution of a bond in the sum of $300.00.

Thereupon the defendant, Black & White Taxicab & Transfer Company, tendered a bond in the sum of $300.00 with N. P. Sims as surety, which bond is now ordered approved and filed.

The plaintiff, Brown & Yellow Taxicab & Transfer Company, by its attorneys, expressly waive the issuance and service of citation.

Chas. I. Dawson, Judge.

[fol. 44] Bond on Appeal for $300.00. approved and filed June 30, 1926, omitted in printing.

[fol. 45] In United States District Court

Notice of Appeal—Filed June 30, 1926

The defendant, Louisville & Nashville Railroad Company, is hereby notified that its co-defendant, the Black & White Taxicab & Transfer Company, will prosecute an appeal to the United States Circuit of Appeals, Sixth Circuit, from an order of the United States District Court for the Western District of Kentucky, Bowling Green Division, entered in this suit on June 30, 1926, granting a permanent injunction against the defendants, Louisville & Nashville Railroad Company and Black & White Taxicab & Transfer Company, and the Black & White Taxicab & Transfer Company hereby requests its co-defendant, the Louisville & Nashville Railroad Company, to join it in prosecuting this appeal from said order of injunction to the United States Circuit Court of Appeals for the Sixth Circuit.

In witness whereof we have signed our names as attorneys for the Black & White Taxicab & Transfer Company this June 30, 1926.

Sims & Herdman, Attorneys Black & White Taxicab & Transfer Company.

The Louisville & Nashville Railroad Company hereby accepts service of the within notice and hereby notifies the Black & White Taxicab & Transfer Company that it does not desire to join with it in prosecuting an appeal in this case to the United States Circuit Court of Appeals for the Sixth Circuit. The Louisville & Nashville Railroad Company expressly waives issuance and service of citation as provided by law on appeal.

In witness whereof the Louisville & Nashville Railroad Company has signed its name through its attorneys, this June 30, 1926.

Rodes & Harlin, Attorneys for Louisville & Nashville Railroad Company.

[fol. 46] IN UNITED STATES DISTRICT COURT

ORDER OF SEVERANCE—Filed June 30, 1926

The defendant, Black & White Taxicab & Transfer Company, having moved the Court for an order of severance in appeal in this case, and having filed with its written motion a notice of its intention to appeal, with the request that its codefendant, the Louisville & Nashville Railroad Company, join it in said appeal, and the Louisville & Nashville Railroad Company having accepted the service of said notice in writing, and in writing endorsed on said notice its refusal to join in said appeal,—

It is therefore ordered that the defendant, Black & White Taxicab & Transfer Company, be and it is hereby granted a severance in this case, in order that it may prosecute in its own name and alone an appeal to the United States Circuit Court of Appeals for the Sixth Circuit from the order granting a permanent injunction herein.

Chas. I. Dawson, Judge.

IN UNITED STATES DISTRICT COURT

ORDER TRANSMITTING EXHIBITS—Filed June 30, 1926

The defendant, Black & White Taxicab & Transfer Company, having moved the Court to have its Clerk properly mark for identification and transmit to the Clerk of the United States Circuit Court of Appeals for the Sixth Circuit, with the record in this case, the original map filed as an exhibit with defendant's evidence, and the original blue print filed as an exhibit with plaintiff's evidence, and the Court being advised, hereby orders that said original map shall be marked "Map" and said original blue print shall be marked "Blue Print" by the Clerk of this Court and forwarded by him with the record in this case to the Clerk of [fol. 47] said Circuit Court of Appeals with directions to said Clerk of said Circuit Court of Appeals that said original map and said original blue print shall be returned to the Clerk of this Court upon the termination of this litigation.

Chas. I. Dawson, Judge.

In United States District Court

Stipulation and Præcipe for Transcript of Record—Filed June 30, 1926

It is hereby stipulated by counsel of both parties in the above styled cause that the appellee, Brown & Yellow Taxicab & Transfer Company, expressly waives issuance and service of citation as provided by law on appeal, and that the Clerk in making up the transcript shall include the following, to-wit:

1. Plaintiff's Bill of Complaint and exhibits.
2. Plaintiff's Amended Bill of Complaint.
3. Defendant, Black & White Taxicab & Transfer Company's motion to dismiss Bill of Complaint.
4. Notice of said motion to dismiss Bill.
5. Agreed and condensed statement of testimony.
6. Map introduced on motion by defendant.
7. Blue print introduced by plaintiff.
8. Order granting injunction.
9. Answer of Black & White Taxicab & Transfer Company.
10. Petition for Appeal.
11. Assignment of Errors.
12. Order granting appeal.
13. Appeal Bond.
14. Notice of Appeal.
15. Order of Severance.
16. Order transmitting exhibits.
17. Stipulation and Præcipe.
18. Injunction Bond.

[fols. 48 & 49] 19. Order approving injunction bond.

20. Clerk's Certificate.

and that an order may be entered accordingly with the permission of the Court.

It is further stipulated by counsel for parties that the maps and blue print referred to above at Items 8 and 9 shall in their original form and bearing their original marks, but identified by the Clerk as "Map" and "Blue Print," be transmitted by the Clerk to the Circuit Court of Appeals as part of the record and to be considered on the appeal of this cause.

Dated at Bowling Green, Kentucky, this 30 day of June, 1926.

Sims & Herdman, Attorneys for Defendant.
Thomas, Thomas & Logan, Attorneys for Complainant.

Bond on injunction for $3,000, approved and filed June 30, 1926, omitted in printing.

[fol. 50] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 51] IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

MOTION TO ADVANCE—Filed August 3, 1926

Comes the appellant, the Black & White Taxicab & Transfer Company, and after having given the appellee Brown & Yellow Taxicab & Transfer Company, due notice that this motion would be made, as is shown by the acceptance of such notice by counsel for appellee, which is hereto attached, and moves this court to advance this case on the hearing calendar so that the same may be heard sometime during the month of October, 1926, and appellant states its reasons for asking that this cause be advanced are as follows:

1. This is a cause wherein a permanent injunction has been granted against the appellant and, therefore, this cause is entitled to precedence.

2. The contract upon which this suit was brought was entered into on December 1, 1925 (See record page 14), and said contract shall remain in force for a period of only one year from its date and thereafter for consecutive periods of one year each until the same shall be terminated by thirty days' written notice by either party (see record page 18, paragraph 22).

If this cause is not advanced now, the probability is it cannot be heard and decided before the expiration of the present contract, and the Louisville & Nashville Railroad Company and the Brown & Yellow Taxicab & Transfer Company could fail to renew their contract on December 1, 1926, and this case would then have to be dismissed, and as soon as it was dismissed, the Louisville & Nashville Railroad Company and the Black & Yellow Taxicab & Transfer Company could enter into a similar contract for a period of one year and before another suit could be brought [fol. 52] and taken through the District Court and the Circuit Court of Appeals in the regular channels a year would elapse and the second suit would have to be dismissed, and thereby appellant would never be given an opportunity to obtain the ruling of this court on the questions involved in this litigation.

Wherefore, appellant prays that its motion be granted and this cause be advanced on the hearing calendar.

Sims & Herdman, Attorneys for Appeallant.

IN UNITED STATES CIRCUIT COURT OF APPEALS

APPEARANCE OF COUNSEL—Filed August 4, 1926

Arthur B. Mussman, Clerk of said Court:

Please enter my appearance as counsel for the Appellant.

Guy H. Herdman, N. P. Sims.

IN UNITED STATES CIRCUIT COURT OF APPEALS

ARGUMENT AND SUBMISSION

October 5, 1926—Before Donahue, Moorman, and Knappen, JJ.

This cause is argued by Mr. N. P. Sims for the Appellant and by Mr. M. M. Logan for the Appellee and is submitted to the Court.

[fol. 53] In United States Circuit Court of Appeals

Appeal from the District Court of the United States for the Western District of Kentucky

Decree—Filed November 5, 1926

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Western District of Kentucky, and was argued by counsel.

On consideration whereof, it is now here ordered adjudged and decreed by this Court that the decree of the said District Court in this cause be and the same is hereby affirmed with costs.

In United States Circuit Court of Appeals

Before Donahue, Moorman, and Knappen, Circuit Judges

Opinion—Filed November 6, 1926

Knappen, Circuit Judge:

The appellee is a corporation organized under the laws of Tennessee, with authority[1]—not only in that state but in other states—to carry on the business of operating for hire taxicabs, trucks and other vehicles for transporting passengers, baggage, freight, etc. It was carrying on a general transfer business at Bowling Green, Kentucky. December 1, 1925, it made written agreement with the Louisville & Nashville Railroad Company—a Kentucky corporation—whereby, on sufficient consideration, it was given for a term of five years (with certain renewal rights and subject to certain conditions and limitations) "the exclusive right and privilege, in so far as it [the railroad company] can legally do so, to solicit the handling or hauling of baggage and passengers on the trains of the Railroad Company and in and around the Railroad Company's passenger depot and [fol. 54] on the surrounding premises; with privilege to have an agent go into the waiting rooms or upon the platform of the depot to take orders for the conveyance of pas-

[1] As stated, under oath, in the bill, and not denied, but impliedly assumed throughout the case.

sengers on inbound trains"; with an assignment of a designated plot of ground adjoining the railway platform for the use of appellee to park its taxicabs while awaiting the arrival of trains. While a like plot at the opposite end of the station was reserved for private vehicles, "not including public taxicabs of outside parties," appellee was given the right, when necessary, to use such space as is not occupied by private motor cars; the Railroad Company reserving the right to change the location of such parking space from time to time, as it might deem necessary or advisable.

Appellant refusing to recognize the validity of such exclusive contract, and accordingly violating the same, and the Railroad Company, while not consenting to or permitting such violation, not having prevented appellant therefrom, appellee filed its bill in equity herein for the enforcement of the contract.

A-mittedly the plaintiff company (appellee) was originally a Kentucky corporation, the incorporators and stockholders being three brothers and their wives. About September 24, 1925 (the precise date is not material), the Kentucky corporation was dissolved, and plaintiff corporation formed under the same name, the incorporators being the same as in the Kentucky corporation. The properties of the Kentucky corporation were turned over to the Tennessee corporation, otherwise no cash or real estate was paid for the stock in the latter, as the articles of incorporation required. The plaintiff corporation has no property in Tennessee, and transacts no business there. Its designated office is in the residence of a brother, at a stated location in Nashville, Tennessee, but plaintiff corporation keeps no books there, nor has it there any offices for business.[2]

It is conceded that plaintiff corporation dissolved its Kentucky corporation and reincorporated in Tennessee "for protection in this controversy or any controversy that may arise out of this or any contracts." The Railroad [fol. 55] Company was made co-defendant with the appellant taxicab company, which denied plaintiff's right to maintain its bill and moved to dismiss the same for the reasons—so far as now important—(1) that under the settled

[2] We do not understand that the facts stated in this paragrph affect the legality of the Tennessee incorporation except as they might be thought to bear upon the question whether it was real or fictitious.

law of Kentucky the contract sued on was contrary to public policy, unauthorized by the Railway Company's charter, monopolistic, null and void; (2) that the contract is in violation of section 214 of the Kentucky Constitution and section 818 of the Kentucky Statutes; (3) that plaintiff's action in dissolving the Kentucky corporation while having a similar contract with the Railway Company, and in attempting reincorporation under the same name in Tennessee, for the purpose of bringing this action in the court below, and evading the settled law of Kentucky governing the contract sued on, was a collusion and fraud on this court for which plaintiff's bill should be dismissed under section 37 of the Judicial Code.

The district court held that plaintiff was guilty of no fraud on the jurisdiction of the court, and that the contract was valid and enforceable. Relief was decreed accordingly.

1. The suit was not collusive within the Code section in question. The motives which induced the plaintiff company to incorporate under the Tennessee statute can have no influence on its validity. Upon the subject of collusion generally the rule is well settled that where, as here, the proposed suit involves a substantial controversy, the fact that plaintiff and the Railway Company preferred that litigation be had in the Federal Courts, instead of in the courts of the state, is not wrongful. "So long as no improper act was done by which the jurisdiction of the Federal Court attached, the motive for bringing the suit there is unimportant." Re Metropolitan Ry. Receivership, 208 U. S. 90, 111, and cases cited on the latter page; Lehigh Mining, Etc., Co. v. Kelly, 160 U. S. 327, 332-3. In the Metropolitan case the defendant not only admitted the averments of the bill, but joined in the request for the appointment of receivers. It was not necessary to the jurisdiction "that the defendant should controvert or dispute the claim. It is sufficient that he does not satisfy it." Re Metropoli-
[fol. 56] tan Ry. Receivership, supra, at p. 108. Equally with or without the presence of the Railroad Company as defendant, and whether or not it was a necessary party the court below had jurisdiction on account of diverse citizenship, as both defendants were citizens of Kentucky.

The ultimately decisive question is merely whether the Tennessee incorporation is real or fictitious: having in mind

that the incorporation is none the less real because of the motive which occasioned it. McDonald v. Smalley, 1 Pet. 620, 624; Smith v. Kernochen, 7 How. 198, 216; Barney v. Baltimore, 6 Wall. 280, 288; Lehigh Mining, Etc., Co., supra. The last cited case, while relied upon by appellant, contains nothing inconsistent with the proposition herein stated, as applied to the instant case. There, the stockholders of a Virginia corporation organized themselves into a corporation under the laws of Pennsylvania, the Virginia corporation conveying its lands in question to the Pennsylvania corporation, which brought in the Federal court a suit in ejectment for the land. The Virginia corporation, however, was not dissolved. Both corporations still existed.[3]

In the case here, on the contrary, the title had actually passed from the Kentucky corporation to the Tennessee corporation. The former had been actually dissolved and its existence terminated. The latter became the sole owner of the right of action. Its Tennessee citizenship was complete and unassailable. The Federal court thus could not be imposed upon with respect to either citizenship or subject-matter of litigation. There was no other corporation clothed with power to compel conveyance by the Tennessee corporation. It seems too plain for argument that the practical wiping out of the stock in the Kentucky corporation was a sufficient consideration for the receipt of the stock in the Tennessee corporation.

[fol. 57] Nor is there anything in Miller & Lux v. East Side Canal Co., 211 U. S. 293, opposed to the conclusion above stated. There a California corporation transferred its property to a corporation organized by it and its stockholders under the laws of Nevada. The Nevada corporation brought suit in the Federal court, asking substantially the same relief as sought in a pending suit brought by the California corporation in a state court, the latter case not having been decided when the suit in the Federal Court

[3] The court said (p. 342): "The Pennsylvania corporation neither paid nor assumed to pay anything for the property in dispute, and was invested with the technical legal title for the purpose only of bringing a suit in the federal court. As we have said, that corporation may be required by those who are stockholders of its grantor, and who are also its own stockholders, at any time, without receiving therefor any consideration whatever, to place the title where it was when the plan was formed to wrest the judicial determination of the present controversy from the courts of the state in which the land lies."

was brought.[4] It may be noted that in the Miller & Lux case (p. 304) it was expressly said: "If before the institution of this suit the California corporation had distributed among those entitled to it the stock of the Nevada corporation, issued to it as fully paid up stock, and had then ceased to exist or been dissolved, a different question might have been presented. But such is not this case." And see the Lehigh case, supra, at p. 336—middle paragraph.

We find in the record of the instant case no tangible evidence that the Tennessee corporation was not intended to be permanent. Not only was the Kentucky corporation actually dissolved and the Kentucky citizenship given up, but presumably the Tennessee incorporation would thereafter be as convenient and desirable as an incorporation in Kentucky.

In Morris v. Gilman, 129 U. S. 315, 328-9, where a suit in the Federal Court was dismissed for bad faith on the part of the individual plaintiff in attempting to acquire a Tennessee residence, the court affirmatively found that "his sole object in removing to that state [Tennessee] was to place himself in a situation to invoke the jurisdiction of a circuit court of the United States. He went to Tennessee [fol. 58] without any present intention to remain there permanently or for an indefinite time, but with the present intention to return to Alabama as soon as he could do so without defeating the jurisdiction of the Federal court to determine his new suit. He was therefore, a mere sojourner in the former state when this suit was brought. He returned to Alabama almost immediately after giving his deposition."

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[4] As said by the Supreme Court (p. 300): "The California corporation had not been dissolved, nor had it ceased to exist when the present suit was brought by the Nevada corporation. It was then in existence, with all of its powers unmodified. And it does not appear that any steps had or have been taken to disincorporate the California corporation. Nor can it be said when, if ever, that corporation will be dissolved";
and again—p. 306—

"As the California corporation could have controlled the conduct of the suit brought by the Nevada corporation at any time after it was brought, and up to the date of the decree below, and could have required the Nevada corporation, in the event of a decree in its favor, to transfer the benefit of such decree to the California corporation, without any new or valuable consideration, we hold that the suit was properly dismissed under the fifth section of the Act of 1875 [now Judicial Code, section 37] as one in which the Nevada corporation was organized and collusively made plaintiff in the suit in the federal court simply for the purpose of creating a case cognizable by that court."

The record in the instant case supports no such conclusion. Mr. Clark, one of the incorporators, called as a witness by defendant, testified that "the Kentucky corporation was dissolved as the law required and that his company was conducting its business as a Tennessee corporation, and proposed to continue to do so." This affirmative testimony was given in reply to a question by the trial judge, who presumably had in mind the question of intention to create a permanent legal residence. The judge formally found as a fact that "the plaintiff was guilty of no fraud on the jurisdiction of the court by reason of its having reincorporated in the State of Tennessee as a Tennessee corporation, for the purpose of having its litigation in Kentucky tried in the Federal court." This finding of fact must be accepted unless the evidence decidedly preponderates against it. In re Snodgrass—C. C. A. 6—209 Fed. 325, 326; Carey v. Donohue, ibid., 328, 333. There is here no such preponderance. Neither the fact that plaintiff had no other property in Tennessee and transacted no regular business therein, nor any other of the considerations relied on by appellant, are sufficient to support a conclusion that the Tennessee corporation was merely fictitious.

2. It is the well established rule in the courts of Kentucky that a railroad company can not grant to one person—a common carrier—to the exclusion of all other persons engaged in a like business, the right to come upon its depot grounds with his vehicles for the purpose of receiving freight and passengers. McConnell v. Pedigo, 92 Ky. 465; Palmer Transfer Co. v. Anderson, 131 Ky. 217; Commonwealth v. Louisville Transfer Co., 181 Ky. 305.

In the courts of the United States, however, the rule is equally well settled that when not unnecessary, unreason-
[fol. 59] able or arbitrary, a railroad may make arrangements, including the granting of special privileges, to a single concern to supply passengers arriving at its terminals with hacks and cabs, and it is not bound, at least in the absence of valid state legislation requiring it to do so, to accord similar privileges to other persons, even though they be licensed hackmen. Such exclusive arrangement is not a monopoly in the odious sense of the word, nor does it involve an improper use by a railroad company of its property. Donovan v. Pennsylvania Co., 199 U. S. 279, 295 et seq. The view above stated is declared (p. 299) in the

pinion of the court "the better view, the one sustained by he clear weight of authority and by sound reason and ublic policy." In the contract in suit, so far as sustained y the district court, we find nothing unreasonable or arbirary.

It is also the settled rule that while the decisions of the tate courts in construing the constitution and statutes of he state, or in passing upon questions of purely local usage, re binding upon the federal courts, unless they conflict vith the federal constitution or a federal statute, or are lealing with rules of general or commercial law; yet, when he question is one of general or commercial law, the fedral courts, while treating the decisions of the state courts vith attention and respect, and (as has been said) with an nclination to follow them so far as persuasive, will nevertheless ultimately exercise their own independent judgnent in deciding the cause. This proposition is elementary.

In none of the Kentucky decisions which have been alled to our attention have the courts of that state assumed o be considering the statutes or constitution of Kentucky. Section 818 of the Kentucky Statutes, so far as it seems even plausibly applicable, is printed in the margin.[5] This tatute plainly has no application to the controversy here. Section 214 of the Kentucky Constitution is likewise fol. 60] printed in the margin.[6] There seems no persuasive reason for construing this section as applicable to the case before us. The last clause—"or for the conduct of any usiness as a common carrier"—is the only feature calling for consideration. But not only does the compiler's reference "See sections 817-819. Ky. Stat.," in connection vith similar marginal references at sections 817 to 819 to ection 214 of the constitution and its adjoining sections, suggest the compiler's understanding thereof as relating o services as a common carrier with respect to transportaion of passengers or freight, but we think it plain that the

[5] "It shall be unlawful for any corporation to make or give any undue or unreasonable preference or advantage to any particular person or locality, or any particular description of traffic, in any respect whatever, in the transportation of a like kind of traffic, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue, or unreasonable prejudice or disadvantage."

[6] "No railway, transfer, belt line or railway bridge company shall make any exclusive or preferential contract of arrangement with any individual, association or corporation, for the receipt, transfer, delivery, transportation, handling, care or custody, of any freight, or for the conduct of any business as a common carrier."

section was meant to be so limited. The only reference by the Court of Appeals of Kentucky, to which we are cited by way of construction of section 214, is contained in L. & N. R. R. Co. v. Stockyards Co., 133 Ky. 148, involving a contract for the delivery to the Bourbon Stockyards "of all live stock, etc., consigned to the City of Louisville." This was quite naturally construed as a preferential contract in direct violation of sections 213 and 214. The history of the adoption of both these sections (pp. 156-159) seems to indicate a construction of section 214 as limited as we have above suggested. cf. Browning v. L. & N. Ry. Co., 281 S. W. 490. We think that under the rule of noscitur a sociis the section would naturally be construed as so limited.

In McConnell v. Pedigo, supra, it was said (pp. 471-472) that there resulted from the monoply there found an inconvenience to the passenger and the public "that the company has no power to create, either by the provisions of its charter or for the reason that it is the owner of the property on which the depot stands." From this statement, especially when considered in connection with Louisville, etc., Co. v. Commonwealth, 146 Ky. 847, and with the statement in the Pedigo case (p. 468), that the plaintiff is not operating under the charter of any transfer company that gives him any peculiar privileges by reason of the public services he undertakes, we do not understand that the conclusion of monopolistic control was based upon a violation [fol. 61] of any provision of the company's charter. It seems rather to declare in effect, that the question was one of general law, unaffected by charter.

It follows that in determining the validity of the contract here in question, we must follow the Federal precedents, and that, as respects the injunctive provision against appellant quoted in the margin hereof, the action below was correct.[1] The Railroad Company has not appealed from

[1] The appellant and its agents and employees were permanently enjoined from "going within the depot of the defendant * * * railrod company * * * or upon the grounds and property of the * * * railroad company adjacent to said depot for the purpose of soliciting business in opposition to the plaintiff herein, and * * * from parking its taxicabs or other vehicles of conveyance on the grounds of the defendant railroad company adjacent to said depot, except, however, that the defendant Taxicab Company may go upon the grounds of the said railroad company to receive passengers or baggage as to which it has made prior contracts, but in so doing it shall not park its cars on the grounds of the railroad company or remain within the said depot longer than is reasonably necessary to discharge said passengers or baggage, or to receive passengers or baggage as aforesaid."

the decree against it. This relief, including the provision against parking cars on the grounds of the railroad company, is directly within the decision of the Donovan case, supra.

3. Burnam's Alley and Curd Street apparently intersect at the corner of the railroad depot. The decree below enjoins appellant "from using Curd Street * * * leading from the northwest side of the line of Birnam's Alley extended across Curd to Kentucky Street, in such a manner as to unreasonably obstruct ingress and egress to and from the depot grounds or to unreasonably obstruct ingress and egress of plaintiff's taxicabs or other vehicles from the parking place allotted to the plaintiff by the terms of said contract, or the ingress and egress of plaintiff's taxicabs and vehicles from Curd Street to *to* the depot or to the streets and grounds adjacent thereto. Otherwise the motion for an injunction against the defendants concerning the exclusive rights of plaintiff to park its cars on Curd Street is denied."

The Railroad Company has no exclusive right to the control of the public streets, and appellant had the right, within reasonable limits, to use such public street, while existing as such, in properly prosecuting its calling, so long as such use does not obstruct others in legitimately using it upon equal terms. Donovan v. Pennsylvania Co., supra, at pp. 303-5.

[fol. 62] It appears that previous to the decree of the district court herein, by court action and city ordinance, Curd Street, to the extent stated in the margin hereof, was closed.[8] It is not entirely clear whether the part of Curd Street covered by the injunction is still a public street. But we think that question not of controlling importance on this record. If, as appellant contends, the right of way of the closed street belongs to the city, and unless the latter is acquiescing in its continued use by the railroad and the public, it is not open to appellant to invoke the city's rights. If, however, the way is still a public highway, legally or de facto, appellant has no right to use it so as to "unreason-

[8] The description of the closed portion is this: "Curd Street from the southeastern edge of the right of way of the Louisville & Nashville Railroad Company to the northwestern boundary of Burnam's alley and Adams street from the northern line of Sophia G. Winlock's property north to where it terminates in the Louisville & Nashville Railroad Company's right of way."

ably obstruct ingress and egress" in either of the three respects involved in the injunction. Donovan v. Pennsylvania Co., supra, at pp. 301-5. And this is the only control the decree attempts. There is substantial evidence in the record that defendant had unreasonably obstructed ingress and egress in the respects enjoined.

The decree of the district court is accordingly affirmed.

[fol. 63] In United States Circuit Court of Appeals

Stipulation of Facts—Filed September 8, 1926

It is agreed between the parties hereto that a charter was granted to the Brown & Yellow Taxicab & Transfer Company by the State of Tennessee during the latter part of September, 1925; that the certificate of the Secretary of State of the State of Tennessee, showing this fact, was introduced in evidence on the trial in the District Court; that a corporation of the same name had previously existed in the State of Kentucky but that said corporation was dissolved during the month of September, 1925, and is not in existence at this time; that the Brown & Yellow Taxicab & Transfer Company, organized under the laws of the State of Tennessee, acquired from the corporation of the same name in Kentucky all of its property and good will in consideration of stock in the Tennessee corporation, and that this transaction took place on September 29, 1925.

Sims & Herdman, Attorneys for Appellant. Thomas, Thomas & Logan, Attorneys for Appellee.

In United States Circuit Court of Appeals

Order Advancing Cause—Filed September 17, 1926

This cause is advanced and assigned for argument at the October session, 1926.

[fol. 64] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 65] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 14, 1927

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(5346)

To the Supreme Court of the United States.

BLACK AND WHITE TAXICAB AND TRANSFER CO., - - Petitioner,

VERSUS

BROWN AND YELLOW TAXICAB AND TRANSFER CO., - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

TO THE HONORABLE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your petitioner, Black and White Taxicab and Transfer Company, respectfully shows to this Court as follows:

I. That on December 2nd, 1925, the respondent, Brown and Yellow Taxicab and Transfer Company, filed in the United States Court of the Western District of Kentucky, at Bowling Green, Kentucky, its bill of complaint against your petitioner, the appellant herein, and the Louisville & Nashville Railroad Company on the ground of diverse citizenship, claiming to be a Tennessee corporation, seeking to compel the Railroad to enforce a preferential and exclusive contract entered into between the respondent

Taxicab Company and said Railroad on December 1st, 1925, in which contract the Brown & Yellow Taxicab and Transfer Company was given the exclusive right and privilege to solicit passengers and baggage on the trains, and in the station and on the premises of the Railroad Station at Bowling Green, and was given exclusive parking space in Curd Street, a public street of the city of Bowling Green, all to the exclusion of your petitioner and others doing similar business, and further seeking to enjoin this petitioner from coming upon the Railroad Station or premises, or parking its cars in the exclusive space set apart to respondent.

II. That the Brown & Yellow Taxicab and Transfer Company had for many years been a Kentucky Corporation engaged in the transfer and taxicab business at Bowling Green and vicinity and on or about October 1st, 1925, it dissolved its Kentucky corporation and re-incorporated under the same name in the State of Tennessee, to thereby acquire a citizenship therein, and as a foreign corporation bring this action in the Federal Courts, to evade the state decisions against the validity of this character of contract, and to get the application of the Federal Court decisions which are in conflict with the Kentucky law on this subject.

III. That the respondent, Brown & Yellow Taxicab and Transfer Company, has no office in Tennessee nor any assets or business therein whatsoever, but all its business is transacted at Bowling Green as before its reincorporation in Tennessee, and this reincorporation is admittedly for the sole

purpose of bringing the federal action and evading the law of the State of Kentucky.

IV. That the Louisville & Nashville Railroad Company made no defense to the injunction suit in the federal court, but openly assisted and colluded with the plaintiff therein to get itself enjoined, and refused to join in appeal with this petitioner from the judgment enjoining it and this petitioner, which judgment was entered in the District Court on June 30th, 1926, and an appeal granted to the United States Circuit Court of Appeals, Sixth Circuit.

V. That the appeal from the District Court's judgment was promptly prosecuted, briefed and argued and on November 5th, 1926, the United States Circuit Court of Appeals affirmed the District Court's judgment enjoining this petitioner from exercising the privileges and rights granted appellee and enjoining the Railroad Company from allowing this petitioner the privileges and rights given appellee, and also affirming the District Court's judgment permitting the Railroad Company to set apart for exclusive parking space the part of Curd Street before referred to herein, and it is to review this judgment of affirmance that the writ of certiorari is respectfully asked herein on the following grounds:-

1. Because the jurisdiction of the Federal Court was obtained by collusion and fraud, and the reincorporation in Tennessee was solely and admittedly for the purpose of making a case cognizable in the Federal Court and thereby evade the settled decisions of the State of Kentucky, and this action

should be dismissed under Section 37 Judicial Code, and the lower court erred in not so doing.

2. Because the judgment is contrary to the decisions of the Court of Appeals of Kentucky repeatedly enunciated over a period of more than thirty years and which has become the settled policy and the law of the State, and the lower court erred in not following these decisions.

3. Because the contract in controversy is ultra vires, repugnant to the laws of Kentucky, and contrary and in violation of the Louisville & Nashville Railroad Company's charter powers and rights as construed by the Kentucky Court of Appeals in similar cases. The Railroad Company is a Kentucky corporation and is prohibited by the legislative act incorporating it from making any contract or regulation contrary to the laws of the State. The lower court erred in not following the construction of the charter as adopted by the Kentucky Court of Appeals.

4. Because the contract in controversy is directly violative of the express provisions of Section 214 Kentucky Constitution and the construction thereof as given by the Court of Appeals of Kentucky in cases involving similar exclusive contracts, and the lower court erred in not so deciding, and following the State court.

5. Because the judgment sought to be reversed permitted the Railroad Company to appropriate, grant and set apart to the respondent

exclusive use of a part of a public street of the city, in violation of the rights of petitioner and the public generally, which was error.

6. Because the judgment, if upheld, and the contract, enforced, will cause untold confusion, and conflict between appellee and other similar carriers, not only in Bowling Green, where conflicting suits in State and Federal Courts are now pending, but will upset the established and settled State policy and thereby permit advantages to an alien, denied the citizens of the State.

The Transcript of the Record of the Court of Appeals is filed herein as required by the rules of this Court.

Wherefore, your petitioner prays this Honorable Court will grant a writ of certiorari in this case to the Circuit Court of Appeals for the Sixth Circuit and bring up this case to this Honorable Court for such proceedings as this Court may deem just.

JOHN L. STOUT,
N. P. SIMS,
GUY H. HERDMAN,

Attorneys for petitioner,
Black & White Taxicab
& Transfer Company.

STATE OF KENTUCKY)
) ss.
COUNTY OF WARREN)

W. T. Renfrew, being duly sworn states that he is the president and chief officer of the petitioner here-

in Black & White Taxicab and Transfer Company, a corporation under the laws of the State of Kentucky, and that he has read the statements in the foregoing petition, and same are true to the best of his knowledge, information and belief, and states his knowledge is derived from the record in this case, and from what has taken place in his presence and hearing in the court when the case was heard.

W. T. RENFREW,

President Black & White
Taxicab Company.

Subscribed and sworn to before me by W. T. Renfrew, this 10th day of December, 1926.

LILLIAN MURRAY,
N. P. W. C. Ky.

My commission expires 15th day of March, 1930.

[SEAL:]

We hereby certify that we have examined the foregoing petition and in our opinion the petition is well founded, and that the case is one in which the prayer of the petitioner should be granted by this Court.

JOHN L. STOUT,
N. P. SIMS,
GUY H. HERDMAN,

Attorneys for petitioner.

Subscribed and sworn to before me by John L. Stout, N. P. Sims and Guy H. Herdman, this 11th day of December, 1926.

LUCILLE POLLARD,
N. P. W. Co. Ky.

My commission expires 5th day of October, 1930.

[SEAL:]

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The Supreme Court of the United States

OCTOBER TERM 1926

BLACK AND WHITE TAXICAB AND TRANSFER CO., - - Petitioner,

VS } No._____

BROWN AND YELLOW TAXICAB AND TRANSFER CO., - Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT.

MAY IT PLEASE THE COURT:—

The decision and judgment thereon sought to be reviewed herein was delivered by the Circuit Court of Appeals, Sixth Circuit, on November 5, 1926, affirming the District Court's judgment and is not yet officially reported in the Federal Reports, but can be found on page 53, printed Transcript.

The judgment of the District Court is on page 28 of the Transcript.

JURISDICTIONAL FACTS

This action involves a controversy between the Brown & Yellow Taxicab and Transfer Company, re-

spondent herein, a Tennessee corporation, against your petitioner, the Black & White Taxicab and Transfer Company, a Kentucky corporation, sued jointly with the Louisville & Nashville Railroad Company, a Kentucky corporation, the federal jurisdiction being based on diverse citizenship and the allegation that the matter in controversy exceeds the sum of $3,000.00, exclusive of interest and costs which latter allegation as to amount is admitted. (Transcript, page 3, Sections IV and V, Bill of Complaint.)

This case involves not only a question of the right of respondent herein to maintain this action in the Federal Court as being brought by collusion and fraud in violation of Sec. 37 of the Judicial Code, but it, likewise, involves the departure by the lower courts from the State Court's construction of the charter of the Louisville & Nashville Railroad Company and Sec. 214 of the Kentucky Constitution and the settled law and policy of Kentucky for the last thirty-five years.

STATEMENT OF THE CASE

The evidence presented to the District Court on the trial of this case discloses the following undisputed facts (Transcript, pages 31-39, inclusive):

That respondent herein had been for several years a Kentucky corporation, doing business in Bowling Green and vicinity; that knowing it could not, as a Kentucky corporation suing in the state courts, enforce a contract giving it exclusive privileges with the Railroad Company, owing to the settled law as adjudged by the Kentucky Court of Appeals, it dis-

solved its Kentucky corporation, but before doing so by resolutions transferred all its assets to the Tennessee corporation; that thereafter it re-incorporated with the same stockholders and officers and under the same name in Tennessee, and executed the contract with the Louisville & Nashville Railroad Company on December 1, 1925, and the next day brought this action in the United States District Court for the Western District of Kentucky.

The appellee is doing no business in Tennessee, has no office in that state, and No. 904 Russell Street in Nashville, Tennessee, which it alleges in its Bill of Complaint is its principal office and place of business, is shown by the affidavit of Joseph H. Acklen, and admitted by Clark, appellee's president, to be a private residence of a railroad engineer and no business of the Brown & Yellow Taxicab & Transfer Company, or any other business is carried on there. The motive for the suit is admitted. (Transcript, pages 35, 36 and 39.) The Railroad Company, instead of resisting the injunction joined with the plaintiff in its motion for same and seeks to get itself enjoined, showing a collusion between them. These are the facts presented and undisputed. The Railroad Company refused to join in the appeal. (Transcript, page 45.)

This appeal involves only the Black & White Taxicab & Transfer Company, as the Diamond Taxi Company mentioned in Amended Bill of Complaint was not brought before the Court nor does the judgment in any way affect it. (Transcript, page 28.)

ASSIGNMENT OF ERRORS

We respectfully state that the District Court and upon appeal the Circuit Court of Appeals in affirming erred as follows:

I. In refusing to dismiss the action under Section 37, Judicial Code, as collusion and fraud to obtain federal jurisdiction and evade the law of Kentucky as declared by its Supreme Court.

II. In refusing to follow the law of Kentucky as defined and settled by its highest court over a period of the past thirty years.

III. In refusing to hold the contract executed by the Railroad, a Kentucky corporation, as in excess of its charter powers, repugnant to the laws of the State, and *ultra vires* and illegal as construed by the Kentucky Supreme Court in similar cases.

IV. In refusing to hold the contract in controversy violative of Section 214, Kentucky Constitution, and prohibited thereby, and to follow and apply the construction of this constitutional provision as made by the Kentucky Supreme Court in similar cases.

V. In allowing the Railroad Company to appropriate and grant to the respondent herein as exclusive parking space, a part of a public street of the city of Bowling Green to the exclusion of this petitioner and the public.

VI. In not following the state court's decisions and thereby causing a chaotic and conflicting condition of law and fact, both in Bowling Green and the State of Kentucky in the matters in issue herein.

ARGUMENT

We will address our argument to the assigned errors in the order above set out.

I. Dismissal of Action Under Section 37 of the Judicial Code

Now the question is presented whether such facts would merit the application of Section 37 of the Judicial Code, which is the Federal Act of March 5, 1875.

It was formerly the law before the passage of the Act above referred to that the motive prompting incorporation could not be questioned, nor was evidence admissible to deny the good faith of the incorporation. This was declared in an opinion by Chief Justice Taney, and it was to this line of decisions that Justice Shiras referred to in his dissenting opinion in the case of *Lehigh Mining & Manufacturing Company* v. *Kelley*, 160 U. S., 327.

But as this Court in that case held it would make the Act of March 5, 1875, idle and of no avail, if, as was done in that case, a Virginia corporation incorporated in Pennsylvania, transferring its Virginia properties to the Pennsylvania corporation, with the same stockholders, and then instituting suit in Federal Court regarding these properties in order to escape and evade the Virginia law, which was adverse to them if tried in Virginia courts.

This Court in that case said:

> "Was the Circuit Court bound to take cognizance of this action as one that involved a con-

troversy between citizens of different states within the meaning of the Constitution and the acts of Congress regulating the jurisdiction of the courts of the United States? This question can be more satisfactorily answered after we shall have adverted to the principal cases cited in argument. The importance of the question before us, to say nothing of the ingenious and novel mode devised to obtain an adjudication of the present controversy by a court of the United States, justifies a reference to those cases . . .

"The arrangement by which, without any valuable consideration, the stockholders of the Virginia corporation organized a Pennsylvania corporation and conveyed these lands to the new corporation for the express purpose—*and no other purpose is stated or suggested*—of creating a case for the Federal Court, must be regarded as a mere device to give jurisdiction to a circuit court of the United States and as being, in law, a fraud upon that court, as well as a wrong to the defendants, such a device can not receive our sanction. The court below properly declined to take cognizance of the case.

"This conclusion is a necessary result of the cases arising before the passage of the Act of March 3, 1875 (18 Stat., at L. 470, Chap. 137). The 5th section of that act provides that if, in any suit commenced in a circuit court, it shall appear to the satisfaction of that court, at any time after such suit is brought, that it 'does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties have been

improperly or collusively made or joined, either as plaintiffs or defendants, *for the purpose of creating a case* cognizable . . . ' under this act, the said circuit court shall proceed no further therein, but shall dismiss the suit. . . .

"The organization of the Pennsylvania corporation and the conveyance, to it by the Virginia corporation, for the sole purpose of creating a case cognizable by the circuit court of the United States, is in principle, somewhat like a removal from one state to another with a view *only* of invoking the jurisdiction of the Federal Court.

"If this action were not declared collusive, within the meaning of the Act of 1875, then the provision making it the duty of the circuit court to dismiss a suit, ascertained at any time to be one in which parties have been improperly or collusively made or joined, for the purpose of creating a case cognizable by that court, would become of no practical value, and the dockets of the circuit courts of the United States will be crowded with suits of which neither the framers of the Constitution nor Congress ever intended they should take cognizance."

The above case is almost identical in fact with the case at bar. The motive was the same, the transfer of properties and identity of corporate agencies the same. This Court laid down the rule that Federal Courts could not be made the vehicle or agent to carry out such a scheme as that, and applied the Act aforesaid which is now Section 37 of the Judicial Code.

This decision does not stand alone, but has been followed since in several decisions under similar facts and circumstances.

> *Miller* v. *Lux, Etc., Canal Co.*, 211 U. S., 293. Also see *Foster's Federal Practice*, Vol. 1, p. 134.

The Circuit Court of Appeals in deciding the issue of fraud in obtaining federal jurisdiction adversely to this petitioner bases its decision upon the fact that the Kentucky corporation had been dissolved and the Tennessee corporation substituted.

Although corporations are artificial persons acquiring an original citizenship where incorporated, the intention of changing citizenship or domicile cannot be as flexible and elastic as in cases of individuals, yet the facts in this case and the case of *Morris* v. *Gilman*, 129 U. S., 315, referred to in the lower Court's opinion, would strike one as almost parallel in fact, intent and legal effect.

In the case at bar the corporation returned immediately to Kentucky, transacting all its business therein, and presumably complied with the statutory requirements of Kentucky necessary before acquiring a situs for the transaction of business in this state.

It is a foreigner only for the admitted purpose of getting an advantage denied to Kentucky citizens, though in every other respect and purpose a resident of Kentucky.

The facts in this case certainly establish a case where a plaintiff was both improperly and collusively made for the sole and only purpose of creating a case cognizable in the Federal Court.

We may in this connection pertinently advance the query as to what would be the legal effect of this injunction, the jurisdiction of which is based on adverse citizenship, if the appellee now claiming a Tennessee incorporation would again dissolve its incorporation in Tennessee and transfer its assets including the contract and exclusive rights acquired herein to a reorganized Kentucky corporation? Would the injunctive right under the contract be still enforcible or would it be abrogated by a change back of citizenship?

This is not merely conjectural, but is reasonably probable, and appellee would naturally and plausibly insist that its assets with contractual rights acquired as a Tennessee corporation could not be impaired or rescinded by a retransfer to its successor and assignee, the Kentucky corporation.

II. This Court Should Follow the Decisions of the Kentucky Court of Appeals

Respondent's attorneys will admit that the decisions of the Kentucky Court of Appeals are directly and squarely adverse to their contention and hold the contract sued on void. While this is admitted, yet in order that this Court may get the exact extent, and application of these decisions, we will quote from the syllabi of these in their chronological order.

In the case of *McConnell* v. *Pedigo & Hayes*, 92 Ky., 465, decided in 1892, the Kentucky Court of Appeals held:

> "RAILROADS GRANTING OF EXCLUSIVE RIGHT TO STAND VEHICLES AT DEPOT.—A railroad company can not grant to one person—a common carrier—to the exclusion of all other persons engaged in a like business, the right to come upon its depot grounds with his vehicle for the purpose of receiving freight and passengers."

We will further quote from the decision itself, as follows:

> "The company (railroad) has undertaken for a monied consideration, or services equivalent thereto, to control the carrying of passengers from its depot to the hotels of the city, and if this power is recognized as being within what is termed a reasonable regulation in the conduct of its business, the company can deny to any one carrying for hire the right of access to its depot for passengers and freight, and thereby monopolize the entire business of transporting passengers and freight to their proper destination within the city or town where the depot may happen to be located . . ."

> "It is saying to the passenger you can enter the hack of McConnell on the depot grounds and be carried to any part of the city of Glasgow, but if you want to ride in any other public con-

veyance you must leave our grounds to find one. McConnell may charge fifty cents for carrying, while the others are willing to carry for half price, still as the first charge is reasonable you must submit. Such a contract prevents competition and makes such a discrimination as is unreasonable and detrimental to the public. There is no obligation on the company to take the passenger or his freight from the depot, but still it is insisted that the railway company has the right to name the party that shall carry him, to the exclusion of all others. The passenger, under this contract between the railway company and McConnell, may want to ride in defendants' hack, still the latter is not allowed to enter the grounds, but the passenger must be subjected to the inconvenience of leaving the grounds of the company to obtain the vehicle in which he prefers to ride."

In 1909, in the case of *Palmer Transfer Company* v. *Anderson*, 131 Ky., 217, the court through Judge Clay again held, following its former decision, as follows:

"Carriers — Regulation — Use of Carrier's Premises—A contract by which a railroad gave a transfer company the exclusive use of a part of its station grounds along which there was a gravel walk, and which was most convenient to the trains on which the greater number of passengers arrived and departed, so that such passengers were compelled to walk 150 feet past

> the transfer company's cabs before reaching a place where other cabs could stand, gave the transfer company a practical monopoly of the transfer business, and was void."

In 1918, in the case of *Commonwealth* v. *Louisville Transfer Company*, 181 Ky., 305, the State Court of Appeals, through Chief Justice Settle, again said:

> "If the contracts between appellee and the railroads are of a character that attempt to confer upon the former a monopoly of the business of transporting passengers or freight to or from their stations, such contracts, under the rule announced in *McConnell* v. *Pedigo & Hays*, 92 Ky., 465, and *Palmer Transfer Co.* v. *Anderson*, 131 Ky., 217, would be void because of their discriminatory effect, and, therefore, could not operate to deprive others engaged in like business to that of appellee from transporting passengers or freight to or from their station."

So, as it is shown, there is no one-decision law in Kentucky, but it is the settled law as repeatedly adjudicated from 1892 to the present, over a period of more than thirty years.

We may here remark that the very conditions of comparative charge for same service as mentioned in the McConnell case (*supra*) now exists in Bowling Green, as one of respondent's competitors charges about half that it charges for the identical service rendered.

Now what weight should be given by this Court to these decisions which are the settled law as determined by the Supreme Court of the State?

We believe that under the decisions of this Court this law as decided by the Kentucky Court of Appeals should be followed as controlling on this question. This matter has been presented to this Court in numerous cases, but it would be a tax on this Court's time to call attention to more than a few.

In *Hartford Fire Insurance Co.* v. *Chicago, Etc., Ry. Co.*, 175 U. S., 91, the Supreme Court said:

> "Questions of public policy as affecting the liability for acts done, or upon contracts made and to be performed, within one of the states of the Union—when not controlled by the Constitution, laws or treaties of the United States, or by the principles of the commercial or mercantile law or of general jurisprudence, of national or universal application—are governed by the law of the state *as expressed in its own Constitution and statutes, or declared by its highest court.*"
>
> (The italics in the above quotation are ours.)

In this case the decisions of the Iowa Supreme Court were followed though contrary to the adjudications of the Federal Court on the same question.

This Court will see that not only in the interpretation of the State Constitution and Statutes is the State Court followed, but also in the law as declared by its highest court, and especially where the state law is so well settled as in the case at bar. We are now discussing this question independent of the constitutional and statutory questions, which we will present later.

The Louisville & Nashville Railroad Company is a Kentucky corporation. The contract sued on herein was executed in and to be performed in Kentucky at Bowling Green. It is a Kentucky contract in all particulars. As this Court said in the case of *Equitable Life Insurance Co.* v. *Brown*, 213 U. S., 29, the construction, meaning and effect of such a contract by the Supreme Court of a state is of *the most persuasive influence*, even if not of binding force in the Federal Court. This case involved the construction, meaning and effect of a policy of insurance executed and to be performed in New York, and that court said:

> "As it is a New York Company, and the contract is a New York contract, executed and to be carried out therein, its meaning and construction, as held by the highest court of the state, will be of most persuasive influence, even if not of binding force, in the absence of any Federal question arising in the case. There is no such question here. (Citing authorities.) This principle has been so frequently decided that further reference to adjudged cases need not be made."

We will call this Court's attention to the additional cases of:

> *Palmer* v. *Ohio*, 248 U. S., 32.
> *Hairston* v. *Danville Railway Co.*, 208 U. S., 598.

In Volume 27, Ruling Case Law, paragraph 58, it is stated that "even in matters of general law the

well settled decisions of the state's highest court are persuasive and will receive attention and respect."

When it comes to a question of persuasion, or if this Court should consider the question of comity, or consider the avoiding of conflict and confusion in the interpretation and enforcement of the law, we believe that our position so far as Kentucky is concerned is the more tenable, more reasonable and more equitable.

Furthermore, if respondent's right in the contract in litigation be considered property, then the decision of the state court in regard to this property, establishing a rule regarding same, is universally followed by the Federal Court and upheld.

L. R. A., 1916A, 1011; 40 L. R. A. (N. S.), 380; 40 L. R. A. (N. S.), 412 to 433.
Guffey v. *Smith*, 237 U. S., 101 (see p. 113).
Hinde v. *Vatter*, 5 Pet., 398; 8 U. S., 168.
Swift v. *Tyson*, 16 Pet., 1.
Kuhn v. *Fairmont Coal Co.*, 215 U. S., 349; 54 Law Ed. 228.

The Donovan Case

Now respondent will cite and rely on but one authority, that of *Donovan* v. *Pennsylvania Co.*, 199 U. S., 278. This case, as this Court will see, is no authority adverse to us on the questions herein discussed. In fact, the question raised in this case was expressly not considered and passed on because not presented in that case. On page 300 in the Donovan case, this Court said:

"If the question had been before the state court, and it had adjudged that a railroad corporation could not grant to one person or company the exclusive right within its station to solicit the custom of passengers (the subject not being covered by any valid statute), then it would have been necessary to consider whether the subject was not one of general law, in respect of which the courts of the United States were entitled to exercise their independent judgment, in light of the settled principles that must always control the determination of the legal rights of parties. *No such question is now presented.*"

(The italics in this quotation are ours.)

There are two particular points expressly reserved in the Donovan case, upon which a different decision would have been no doubt reached.

Both of these exceptions are found in the case at bar. One, the statutory and constitutional inhibitions, above referred to and hereinafter discussed; and the other, the long and well-established decisions of the Supreme Court of Kentucky.

This Court in the Donovan case based its decision upon the absence of any valid statute, and furthermore, as a matter of general law, made no decision as this was not presented.

III. The Contract Is In Excess of Railroad Company's Charter Power and Unenforceable

The Louisville & Nashville Railroad Company is

a Kentucky corporation, incorporated by Act of the Legislature of Kentucky, approved March 4, 1850, and found in Acts of the Legislature of Kentucky, 1849-50, Chapter 325, page 354, *et seq.*

The Court of Appeals of Kentucky in considering *this railroad company's* charter right to execute a similar contract in the *McConnell* v. *Pedigo, Etc., case*, 92 Ky., 465, held, and so stated in two places in this opinion, that the contract was in excess of the railroad's charter rights, concluding its decision as follows:

> "There is no question here affecting the safety or comfort of passengers at this depot, but there arises from this contract, if enforced, an inconvenience to the passenger and the public that the company has no power to create, *either by the provisions of its charter* or for the reason that it is the owner of the property on which the depot stands, and the court below properly dissolved the injunction. The judgment is affirmed."
>
> (The italics in this quotation are ours.)

And further in the opinion on the same subject said (page 468):

> "The railroad company in undertaking to say no one shall approach the depot for that purpose except those it may select is *going outside of its charter* and regulating the business of others over whom they have no control."
>
> (The italics in above are ours.)

Now this construction by the Kentucky Court of Appeals that a contract such as is sought to be enforced herein is in excess of the railroad company's charter and unauthorized, thereby is binding upon the Federal Court. The charter of the Louisville & Nashville Railroad Company is, as above stated, an Act of the Kentucky Legislature and the decision of the Court of Appeals in the McConnell case construes an act of the Kentucky Legislature. Therefore, its decision in the McConnell case is certainly binding upon the Federal Court.

To this effect see the case above cited of *Equitable Life Assurance Society* v. *Brown*, 213 U. S., 25; also *Fifth Avenue Coach Co.* v. *New York*, 221 U. S., 467.

In the former case, this Court said, quoting the syllabus:

> "Decisions of the highest court of the state of New York as to the construction of a charter of the insurance company obtained under a law of the state are binding upon the Federal Courts."

The Circuit Court of Appeals cited in this connection as adverse to respondent's position the Kentucky case of *Louisville Property Co.* v. *Com'th*, 146 Ky., 847.

This action was one of escheat by the Commonwealth of Kentucky of certain hotel property owned by the Louisville & Nashville Railroad Company at Guthrie, Kentucky, and used for the accommodation of its passengers at this junction point. It was con-

tended by the State of Kentucky that this property was not used in connection with the railroad's business as a common carrier, and hence escheated under the Kentucky law to the State. In denying the State's contention its Court of Appeals held that this hotel was used in connection with its carrier business for the convenience of its passengers and employees, and furthermore, that this land would be ultimately needed for additional trackage and legitimate railroad uses.

This did not involve any charter rights of the railroad. On the other hand, it does uphold our contention herein, that the contract herein involved must necessarily have been made by the railroad in connection with its business as a common carrier, and hence falls within the inhibition of Sec. 214, Kentucky Constitution.

Now Section 8 of the Act incorporating the Louisville and Nashville Railroad reads as follows:

> "SEC. 8. *Corporate Powers.*—The said Louisville & Nashville Railroad Company, so formed as aforesaid, shall have succession of members for ninety-nine years, may have a common seal, may sue and be sued, plead and be impleaded, in any court of law or equity; and may make all such regulations, rules and by-laws as are necessary for the government of the corporation, or for effecting the object for which it is created: *Provided*, that such regulations, rules and by-laws shall not be repugnant to the laws and constitutions of the said State or the United States; *Provided*, that notice or service of process upon

> the principal ostensible officer or agent of the company, in the State from whose court that process emananted, shall be deemed and taken to be due and lawful notice or service of process upon the company, so as to bring it before the court."

We respectfully submit that the contract and regulation sought to be enforced herein is expressly violative of this section of the railroad's charter, being admittedly in direct contravention of the state law.

The Louisville & Nashville Railroad Company owes its very existence to a legislative act of the State of Kentucky, yet this recipient of a State's liberal dispensation would now seek to enter into and enforce a contract repugnant to the law and jurisprudence of the very state that created it. It would now arrogate to itself privileges and benefits denied to the other Kentucky citizens and which have heretofore been denied to it in the Kentucky courts.

While not a party to this appeal, it has by its legal machinery aided and abetted in getting itself enjoined and in the District Court openly joined with plaintiff for that purpose, in order to enforce a contract which as a Kentucky citizen in Kentucky courts had been in other cases denied it both as against public policy and contrary to its charter powers.

Even if the contract in controversy be not regarded as *ultra vires*, and in express contravention of its corporate charter, it is admittedly illegal under the laws of the State of Kentucky, and against the public policy of the state as declared in numerous decisions of its highest legal tribunal.

While as a matter of original decision this Court may think that the rule as enunciated by it in the Donovan case is the better law and policy, yet to adhere to this decision in the case at bar when the Kentucky courts have for thirty odd years adopted a different policy to which its citizenship have conformed, and which has become the settled and recognized part of our legal fabric, would bring about untold confusion and conflict.

The decisions of a State's highest Court, are in matters of general law most persuasive, and will, as this Court has often stated, be treated with consideration and respect, and especially is this rule applicable when a departure will give an undue advantage to an alien citizen denied to the State's own citizens.

Uniformity in the law is most desirable, and especially should there be a uniformity in its enforcement.

To allow respondent herein to exercise exclusive privileges which had been denied to Kentucky citizens at Glasgow, Louisville and Paducah, and in some instances with this same railroad, would seem an unjust judicial discrimination.

And further, while your petitioner, the Black & White Taxicab and Transfer Company, is enjoined by the Federal Court, another company not a party to this action and resorting to the State courts for redress against this preferential contract, would be under the Kentucky law permitted to exercise the very privileges denied our client.

In fact, this very condition now exists and the Court of Appeals of Kentucky in a mandamus action to compel the Warren (Ky.) Circuit Court to try the case of another transfer company against the railroad and respondent herein involving the validity of this very contract said:

> "But for the Federal Court case, the Warren Circuit Court, following the authorities above cited, would have no doubt promptly decided the case pending before it in favor of the petitioner. But the Federal Court having first acquired jurisdiction of the essential cause of the controversy, the Warren Circuit Court was presented with the dilemma of whether under the State rule concerning the validity of such contracts, he should enjoin the railroad as the petitioner asked or under the doctrine of the comity of courts he should decline to forbid the railroad to do something which it had been ordered to do by a Federal Court of competent jurisdiction. See *State* v. *Murray*, 79 S. C., 316, 60 S. E., 928; 15 C. J., 1160. As there was a chance that the Federal Court would dismiss the suit pending before it because of the alleged fraud on its jurisdiction, and as a prompt decision in that forum was reasonably expected, the respondent was not unreasonable or arbitrary in awaiting the outcome of that case since its decision if it fell one way would relieve the court of all embarrassment and probably insure the petitioner the relief he sought."

Diamond Taxi Co. v. *Gilliam Judge, 216,* Ky., *521,* decided November 12, 1926.

The mandamus was denied as the Circuit Judge's response was to the effect he would decide the case as soon as the opinion of the U. S. Circuit Court of Appeals was filed, and that he was awaiting the decision as a matter of court comity.

This but illustrates the untold confusion and conflict not only in the State of Kentucky, but also locally in Bowling Green, if the judgment of the lower court be upheld.

We may go further and reasonably inquire that with a precedent of this court to uphold them, what is to prevent respondent from extending its business to Glasgow and other cities of the State, entering into similar contracts with the railroad and thereby excluding from competition the very competitor the state court has upheld? This would result in "confusion worse confounded" as this Court can readily see.

The opinion of the Circuit Court of Appeals in holding that the Kentucky decision of *McConnell* v. *Pedigo* (*supra*) did not in effect decide that the railroad company exceeded its charter right, but rather declared it a matter of general law, relied for its conclusions on the case of *Louisville Property Co.* v. *Com'th*, 146 Ky., 847, which we have heretofore discussed and also the following quotation from the *McConnell* v. *Pedigo* opinion:

> "The plaintiff is not operating under the charter of any transfer company that gives him any peculiar privileges by reason of the public services he undertakes."

We must confess that we cannot see how it makes any difference on the question of the railroad company's charter whether the plaintiff (McConnell) in the Pedigo case, or respondent, Brown & Yellow Taxicab and Transfer Company, in the instant case, is a corporation or individual.

Whether incorporated or not, they are alike common carriers of passengers for hire, nor does the incorporation give them any greater privileges or rights of contract than an individual or partnership conducting a similar business would have.

The Kentucky Court in the excerpt quoted merely stated that the plaintiff or transfer company therein did not claim any exclusive or peculiar charter privileges entitling him to the rights claimed. Neither does the appellee herein by virtue of its incorporation claim any exclusive or peculiar rights of contract.

With the greatest deference to the lower court's decision, we can not see the bearing of this part of the Kentucky decision alluded to, on the question of the railroad's charter power, except that the Court assumed that the plaintiff in the McConnell suit was the railroad, which of course was not the case.

IV. The Contract Was Contrary to Section 214, Kentucky Constitution, and Therefore Unenforceable

Section 214 of the Kentucky Constitution is as follows:

"EXCLUSIVE OR PREFERENTIAL CONTRACT FORBIDDEN.—No railway, transfer, belt line or railway bridge company shall make any exclusive or preferential contract or arrangement with any individual, association or corporation, for the receipt, transfer, delivery, transportation, handling, care or custody of any freight, *or for the conduct of any business as a common carrier.*"

(The italics in above quotation are ours.)

It expressly prohibits a railroad from making any exclusive or preferential contract, or advantage with anyone in the conduct of its business as a common carrier. This is so plain and this inhibition so broad and sweeping that it would seem unnecessary to argue this matter to any length. A contract such as here presented, which plainly and unequivocally grants an exclusive and preferential right and advantage by the railroad company to the respondent, is manifestly contrary to this constitutional provision. It is in the capacity of a common carrier of passengers and their baggage that the railroad grants this exclusive right to respondent itself, a common carrier of passengers and baggage, denying thereby equal or any rights in this regard to petitioner or to other tranfer or taxi companies in Bowling Green, who are likewise common carriers. It is only as a common carrier that the railroad company can contract, for that is the only business it can conduct under the Kentucky Constitution.

Section 210, Kentucky Constitution, reads as follows:

"COMMON CARRIER NOT TO ENGAGE IN ANY OTHER BUSINESS.—No corporation engaged in the business of common carrier shall directly or indirectly, own, manage, operate or engage in any other business than that of a common carrier, or hold, own, lease or acquire, directly or indirectly, mines, factories or timber, except such as shall be necessary to carry on its business; and the general assembly shall enact laws to give effect to the provisions of this section." (See Section 768, Ky. Stat.)

This Court will bear in mind that the *McConnel-Pedigo case*, decided in 1892, by the Kentucky Court of Appeals, arose before this present constitutional provision was adopted and this question was never raised in the later cases following the early decision. Had it been, there would have been no hesitancy by the Kentucky Court in holding the contract contrary to the Constitution.

In a similar case, the Kentucky Court of Appeals construed and applied Section 214 of the Kentucky Constitution. This authority is directly in point and the Kentucky Court of Appeals held a contract of this same railroad company very similar to one at bar violated Section 214 of the Constitution and the contract was, therefore, void and unenforceable. We refer to the case of *Louisville & Nashville Railroad Company* v. *Central Stockyards Company*, 133 Ky., 148; 97 S. W., 778, where the railroad company entered into a contract with the Bourbon Stockyards in which was stipulated and agreed by the railroad:

> "That it will deliver and cause to be delivered to the second party (Bourbon Stockyards) so far as it legally may, all livestock shipped over the roads of the first party and consigned to the City of Louisville."

This contract was in this provision declared preferential and in direct violation of Section 214, Kentucky Constitution, the Kentucky Court of Appeals saying:

> "That this is an exclusive and preferential contract, such as is expressly forbidden by Section 214 of the State Constitution, there can be no doubt, and likewise such as the courts everywhere have denounced as against public policy, because promotive of monopoly and hurtful to the public, as well as the person or persons sustaining special injury therefrom."

The Kentucky Court of Appeals commented in this opinion on the doubt by the railroad of its right to make such a contract in using in its contract the words "so far as it legally may." These identical words, "insofar as it can legally do so" are used in the contract sought to be enforced herein, showing a like doubt of its legality, by the defendant railroad. (Transcript, page 15, Section 5.)

> "That the railroad company shall give and grant unto the tranfer company (subject to the conditions and limitations hereinafter set out) the exclusive right and privilege, insofar as it can legally do so, to solicit the handling or haul-

ing of baggage and passengers on the trains of the railroad company and in and around the railroad company's passenger depot and on the surrounding premises; with privilege to have an agent go into the waiting rooms or upon the platforms of the depot to take orders for transfer of passengers or baggage."

As in the Stockyards case, an exclusive right was given by a common carrier in the delivery of its freight to the stockyards, so in the case at bar an exclusive right is granted by the same common carrier in the delivery of its passengers to the respondent on its premises. The cases are identical except as to the matter transported—in that case livestock, in this case passengers, but both clearly in "the conduct of its business as a common carrier" as prohibited by this Constitutional provision. And the Kentucky Court of Appeals further on in this decision stated the effect of its construction of a State Constitutional provision on the Federal Courts, and its recognition by these Courts as controlling, saying:

"The Supreme Court long ago adopted the rule that it would accept the construction of a state constitutional provision or statute adopted by the highest court of such state, provided they do not conflict with some provision of the Federal Constitution or federal statutes. (Citing cases.) As we understand the decisions of the Supreme Court it will in a case like the one at bar apply the same test applied by the state courts, which is whether or not the constitutional provision or statutory provision, as the

case may be, can be enforced within the particular state without affecting the railroad company with respect to the performance of its duties in other states."

•

That the Kentucky Court intended that Section 214 apply to all business, passenger or freight, of a railroad, we will quote the following from same opinion (page 177):

"*While a railroad company must be conceded the power to regulate transportation of passengers and freight on its own road, it cannot exercise it in such a manner as to unduly advantage certain individuals and exclude others, or to foster a particular industry by crippling another. It will not be allowed to so operate its road or conduct its business as to promote monopoly or stifle competition; for the one is necessarily hurtful to the public, and therefore against public policy, while the other is the best protection to the public. A railroad company is, therefore, without power to enter into a preferential or exclusive contract with any of its patrons.* If possessed of such power, railroad companies might, as said by Judge Baxter in the Stockyards case of *Coe* v. *L. & N. R. R. Co.*, *supra*, 'destroy a refractory manufactory, exterminate, or very materially cripple competition, and in large measure, monopolize and control the several branches of useful commerce, and dictate such terms as avarice may suggest. We think they possess no such power to kill and make alive. Impartiality in serving their patrons is an imperative obligation of all railroad

> companies, equality of accommodation in the use of railroads is a legal right of everybody. The principle is founded in justice and necessity, and has been uniformly recognized and enforced by the courts. A contrary idea would concede the railroad companies a dangerous discretion, and inevitably lead to intolerable abuses. It would to a limited extent make them masters, instead of servants, of the people . . ."
> (Italicized by us.)

Now, the *Donovan case* admits that this character of contract is preferential and exclusive for in this opinion this Court said:

> "It is true that by its arrangement with the railroad company the Parmalee Company was given an opportunity to control to a great extent the business of carrying passengers from the Union Passenger Depot to other railway stations and to hotels and private houses in Chicago."

The United States Circuit Court of Appeals has given Sec. 214, Kentucky Constitution, a very narrow and restricted construction, and has held that the final clause, "or for the conduct of any business as a common carrier" is by the rule of *noscitur a sociis* which it applies, restricted to the "receipt, transfer, delivery, etc., of any freight" as set out in the preceding part.

This construction we respectfully submit is both illogical and unauthorized.

This provision of the Constitution is self-executing, and needs no enabling acts to give it effect as an express negative to any claim of right prohibited.

The constitutional provisions should be interpreted to subserve the purpose for which they were enacted, and to that end the evil to be remedied should be considered.

> *Louisville School Board* v. *King*, 127 Ky., 824; 107 S. W., 247.
> *Board of Penitentiary Com'rs*, v. *Spencer*, 159 Ky., 255; 166 S. W., 1017.

And in construing the language used the Kentucky Court of Appeals holds:

> "The language employed in the Constitution is to receive its plain meaning as ordinarily understood by the generality of the people."
>
> *Crick* v. *Rash*, 194 Ky., 205; 229 S. W., 63.
> *Belleter & Wiley* v. *State Highway Com'rs*, 203 Ky., 15; 261 S. W., 855.

With the above authorities as a guide to the construction of the clause of the Kentucky Constitution in controversy, to-wit: "or for the conduct of any business as a common carrier," let us examine it. The Circuit Court of Appeals would give to the word "any" the restricted and narrow meaning of "such" or "like." On the contrary, this word according to the general accepted definition by all lexicographers is that of "every" or "all." So with this usual and ordinary meaning, the constitution would extend its prohibition to preferential or exclusive contracts not only regarding freight but to the "conduct of all (every) business as a common carrier."

This was the evident purpose of the framers of the Constitution to prevent any preferential or exclusive contracts by common carriers which from their public nature and service, and powers granted and exercised, would thereby create monopolies, and unjust discrimination and throttle competition.

So, if the contract in controversy is made in the conduct of any common carrier business, be it freight or passenger, it falls within the prohibition of the Constitutional provision.

Now, to best determine this is to examine the contract itself and especially paragraph 5 thereof heretofore quoted on page 27 of brief.

This Court will note that not only is the exclusive privilege to solicit the handling and hauling of the railroad's passengers and baggage given in the station and on the platform and premises, but likewise on the trains themselves of the railroad.

And further under paragraph 7 of the contract (Transcript, page 15):

> "That the railroad company shall issue baggage checks in such quantities as may be required by the transfer company and hereby empowers said transfer company to attach checks to baggage at whatever point, or location it may be delivered to the transfer company for delivery to the depot of the railroad company."

This gives the favored taxi company the exclusive right to check baggage at any point in the city of Bowling Green or elsewhere that the taxi company operates.

We quote these provisions to show that it is "carrier service" that is affected and necessarily embraced in this contract, and must be included in the contemplation of the constitutional provisions.

It cannot reasonably be argued that the railroad could make any kind of preferential contract regarding passenger service, but was prohibited from like contracts regarding freight. And if this prohibition applies to passenger service at all, it certainly embraces this character of contract which extends to passengers, prospective, in transit, and on arrival at destination.

The Kentucky case of *Browning* v. *L. & N. R. R. Co.*, 281 S. W., 490, cited in the opinion of the United States Circuit Court of Appeals did not involve either of the constitutional provisions in controversy, nor even the statutory provisions cited by the Court. This was a case where a person sought to compel the railroad to permit him to erect a coal shute on its right-of-way for purely private purposes. This the court refused to do, holding that this matter did not affect the railroad company's passengers, freight or servants, holding as in a previous decision that the public was not affected in any way and could not be.

In the instant case the public is materially affected as it is compelled to walk some 150 feet from the railroad station to get a competitive taxi, or to submit to the charges of the Yellow Taxi Company, which are in certain particulars for similar service greatly in excess of one of its competitors.

Nor does the references by the compiler of the Kentucky Statutes, or his annotations militate

against our position. It seems that this identical and precise question as affecting passengers has never been before the Kentucky Court of Appeals, but certainly by analogy both of reason and constitutional intention, this section would prohibit preferential contracts affecting passengers as fully as preferential contracts covering live stock as held in the Stockyards case (133 Ky., 148).

The last clause in the Section of the Kentucky Constitution under consideration would be mere surplusage and a meaningless repetition if it be confined to freight business only. The words "receipt, transfer, delivery, transportation, handling, care or custody of any freight," as used in the Section certainly covers every possible and conceivable contract regarding freight, and to interpret the last clause "or for the conduct of any business as a common carrier," as applying only to freight would add nothing to the preceding part.

It is presumed that every clause in a constitutional provision is significant, enacted for a purpose and carrying a potent meaning.

The transportation and delivery of freight is but a part of the carrier business of a railroad. The carriage of passengers and baggage is equally carrier service. Is it then reasonable to conclude that a constitutional inhibition against preferential and exclusive contracts should be narrowed and limited to freight alone, when it expressly inhibits freight contracts and adds "or (contracts) for the *conduct of any business as a common carrier*"?

Baggage is a species of freight, yet under the learned Appellate Court's interpretation the preferential contract herein giving the respondent the exclusive right to receive and haul baggage as well as passengers is permissible and not within the constitutional inhibition.

We respectfully submit that this construction appears both illogical and unjust to the public sought to be protected thereby.

And if we have recourse to the debates on these sections of the Constitution, and the report of the Convention Committee on Railroads and Commerce, it can be seen that the convention was against a discrimination whether in freight or passenger service, and against a railroad granting exclusive and preferential contracts as common carrier of whatever character, be they freight or passenger.

As said by one of the members in debating these various provisions applicable to railroads.

> "They are public corporations, created to subserve the public interests, and the moment you subserve one individual at the expense of the public, you have violated the fundamental principle on which common carriers are created. A common carrier must treat everybody alike. That is all we ask."
>
> Debates, Constitutional Convention (Ky.), 1890, 4 Vol., pages 5132-5162.

We respectfully submit that in the light of the intent of this Section, the debates thereon, the evil to be prohibited, the rule of construction to give effect to every part and avoid surplusage and repetition, and especially in the light of the express language itself this Section 214 was intended to and did cover the contract in controversy.

The first case of *McConnell* v. *Pedigo & Hays*, involving these contracts, was decided, as we have heretofore stated, prior to the adoption of the present Constitution of Kentucky, nor was the issue of unconstitutionality raised in the subsequent similar cases as the reports show.

Had it been, there can be no doubt the Kentucky Court of Appeals would have applied this Constitutional barrier as readily as it did the barrier of public policy of the State, and as it applied Sec. 214 to a similar preferential contract for delivery of live stock in the Stockyards case (*supra*).

If this constitutional provision applies to contracts affecting passengers or applies to any business of a common carrier other than freight, it stands as a prohibition and barrier to the contract under consideration.

V. Extending Injunction to Curd Street Was Error

There is apparent confusion in the opinion of the Circuit Court of Appeals with reference to the Curd Street issue in this case. It is not a question of in-

terference by petitioner with respondent in the use of this street in its ingress or egress from the railroad station, but it is the absolute setting apart for the exclusive use of respondent a part of this public street, and prohibiting petitioner from using it in any way. This is petitioner's ground of complaint.

In order that this Court may fully understand the facts and thereby avoid the lower court's confusion, we will briefly review the facts upon which this issue is based.

Curd Street is a public street of the City of Bowling Green and has been for thirty years or more. It runs from Kentucky Street in a westwardly direction across the tracks and right-of-way of the railroad through what is known as the Ragland Addition to Bowling Green. This street adjoins on the south the recently acquired property of the railroad upon which the new passenger station at Bowling Green is built.

For the railroad's convenience and to avoid such regulation and stopping of trains as the open street would necessitate, the City of Bowling Green by ordinance closed that portion of Curd Street which crossed the tracks and right-of-way of the railroad, but the street in all other respects and up to the railroad's right-of-way is still a public street of the city.

No deed or grant of this street contiguous to the right-of-way on either side of same was made by the city to the railroad, nor does the railroad assert or show any ownership or exclusive right to this street.

There is a part of Curd Street between Burnum's alley, so-called, and the right-of-way of the railroad a space south of the railroad property, about fifty feet in depth and the width of the street, which is about thirty feet. This space the railroad, as we insist, without legal right or authority from the city has given to the respondent Taxicab Company as an exclusive parking space, prohibiting the petitioner from parking its cars therein or using it in any way.

This is the parking space referred to in paragraph 6 of the contract (R., 10). It is to this unwarranted appropriation of this public street and property by the railroad and its exclusive grant to respondent for parking purposes to petitioner's exclusion, that exception was particularly taken and insisted on both in the District Court and upon appeal to the Circuit Court of Appeals.

That this is a flagrant invasion of petitioner's and the public's rights, we believe will be readily seen by inspecting the maps filed as exhibits herein.

This is especially injurious to petitioner, as it compels it to park its cars on the extreme south side of Curd Street east of Burnam Alley, some 50 to 75 feet further from the passenger station than would otherwise be required, and further places its taxicabs in such a position that passengers coming around the south end of the station pass this exclusive parking space occupied by respondent's cars before they can reach the cars of petitioner.

We do not believe that either the District Court or Circuit Court of Appeals were properly cognizant of the situation, or they would never have extended the injunction to exclude petitioner from a public street of the city.

It is not petitioner's duty to invoke the City to interfere and offer objection, as the opinion of the Circuit Court of Appeals would indicate, but rather it is the duty of respondent taxicab company to establish a legal right to this exclusive use, when the facts and presumptions are to the contrary. This was never done or attempted, and the injunction is clearly erroneous in this particular and not sustained either in law or fact by the Donovan case cited in the opinion on this point.

VI. Conclusion

This case involves no Federal right. It is the request by a former Kentucky citizen, which has stepped across the border and incorporated in a neighboring state, made of the Federal Court of Kentucky to give it privileges, rights and advantages denied the citizens of the state where the court sits. It is a petition for judicial discrimination against the citizens of Kentucky in favor of an alien of the State. It is an attempt to create conflict and confusion in this state in matters herein involved, and to give respondent in Bowling Green exclusive advantages denied by the courts of Kentucky to citizens in Louis-

ville, Paducah and Glasgow where the same question arose.

To uphold this contract and permit the respondent Brown & Yellow Taxicab Company, to exercise privileges denied by the laws of the State of Kentucky, to your petitioner is in direct conflict with Section 202 of the Kentucky Constitution, which reads as follows:

> "Sec. 202. FOREIGN CORPORATIONS SUBJECT TO LAWS RELATING TO DOMESTIC CORPORATIONS. —No corporation organized outside the limits of this state shall be allowed to transact business within the state on more favorable conditions than are prescribed by law to similar corporations organized under the laws of this commonwealth."

The Kentucky Court of Appeals in construing the above quoted section of the Kentucky Constitution in the case of Castle's Admr. vs. Acrogen Coal Co., 145 Ky. 591, said on page 593:

> "And so, when a foreign corporation comes into this state, as did the Acrogen Coal Company, for the purpose of transacting business within this State, it subjects itself to *all* of the laws of this State applicable to domestic corporations. A foreign corporation is not entitled to enjoy in

this State any privileges or immunities that a domestic corporation can not enjoy. *What a domestic corporation can not do, a foreign corporation can not do.*"

(Italics are ours.)

Again the court of last resort in Kentucky construed Section 202 Kentucky Constitution in the case of Bowman vs. Breyfogle, 145 Ky. 443, and used almost the identical language quoted above from Acrogen Coal Company case.

Now it must be admitted by respondent that no Kentucky corporation could have entered into this contract in question with the Railroad Company. And under Section 202 of the Kentucky Constitution as construed in the Breyfogle and Acrogen Coal Company cases, no foreign corporation can be preferred over a Kentucky corporation and permitted to enter into a contract with the Railroad Company which the court of last resort in Kentucky has denied to the Kentucky corporations. This constitutional provision alone would prevent the contract in controversy being upheld and its enforcement permitted.

We believe that even if this case did not present precedents binding upon this Court, it would, as a matter of comity between courts, to avoid a chaotic condition in the law, and to prevent a palpable and unjust discrimination against Kentucky citizens, refuse to uphold and sanction the contract herein sued on.

We, therefore, respectfully ask that the petition for writ of certiorari be granted and the Circuit Court of Appeals' decision be reviewed and reversed.

Respectfully submitted,

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N. P. SIMS,
GUY H. HERDMAN,
Attorneys for Petitioner.

AUTHORITIES CITED

Donovan vs. Pennsylvania Railroad Company,
199 U. S. 278.

Louisville Property Company vs. Commonwealth,
146 Ky. 847 ; 143 S. W. 412.

R. C. L. Vol. 27, paragraph 58, title
"United States Courts."

R. C. L. Vol. 7, paragraph 38, title
"Courts."

Salem Trust Company vs. Manufacturers'
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THE SUPREME COURT OF THE UNITED STATES

BLACK AND WHITE TAXICAB & TRANSFER COMPANY, — *Appellant*

VS.

BROWN AND YELLOW TAXICAB & TRANSFER COMPANY, — *Appellee*

BRIEF FOR APPELLEE

MAY IT PLEASE THE COURT:

The decision of the Circuit Court of Appeals, Sixth Circuit, rendered November 5th, 1926, affirming the judgment of the District Court for the Western District of Kentucky which is found beginning on page 53 of the printed transcript, so fully sustains the contention of Appellee that we can add little that will be of assistance to this Court. We shall follow the arrangement of the brief of Appellant in support of its petition for writ of certiorari.

I. DISMISSAL OF ACTION UNDER SECTION 37 OF THE JUDICIAL CODE.

The authorities cited by counsel for Appellant do not support their position. Appellee is a Tennessee corporation, having been organized prior to the making of the contract in controversy. There had been a Kentucky corporation of the same name. It

was dissolved as required by the laws of Kentucky. A new corporation was organized under the laws of the State of Tennessee, and it took over the property formerly belonging to the Kentucky corporation. We insist that Appellee, acting in good faith, was within its rights in obtaining its charter from Tennessee, although it may have done so for the purpose of conferring on the Federal Courts jurisdiction to determine controversies which might arise between it and the citizens of Kentucky.

Counsel for Appellant appear to have entirely misconstrued the principles announced in the case of Lehigh Mining & Manufacturing Company vs. Kelly, 160 U. S. 327. That case and the cases therein cited all concur in holding that where real estate is conveyed by a corporation or citizen of another state for the sole purpose of conferring jurisdiction on the Federal Courts and the conveyance is fictitious and not real that it will not operate to confer jurisdiction. It is also held in that case, and the cases therein cited, that where the conveyance is in good faith, and not fictitious, it will confer jurisdiction. The Lehigh case, supra, and the cases therein cited, fully support the contention of Appellee and disprove entirely the contention of Appellant. The Tennessee corporation was organized in good faith and is the only corporation in existence having connection with this suit as Appellee. The Appellee is the real party in interest and not a fictitious party. It can not be said that a Kentucky corporation is the real party as there is no Kentucky corporation which is a party to this appeal.

II. Should This Court Follow the Decisions of the Kentucky Court of Appeals?

It is true that the Kentucky Court of Appeals in two cases, and probably in three, has held that a contract such as the one in controversy is invalid. As to whether the Kentucky Court of Appeals would adhere to these opinions in the face of the more recent opinions of this court, if the question should be again presented to that Court, is one of grave doubt. It was insisted in the District Court as well as the Court of Appeals by Counsel for Appellant, that the Federal courts were compelled to follow the decisions of the Kentucky Court of Appeals on questions of general law. They seem to have abandoned their contention, as we do not find in their brief the same contention made by them in the lower courts. The authorities are all against their contention if they still mean to insist upon it. We call the attention of this court to the case of Salem Trust Company vs. Manufacturers' Finance Company, 264 U. S. 182, and the cases therein cited. We also invite the attention of the Court to the general rule on this question found in Paragraph 58, Volume 27, R. C. L., under the title "United States Courts". Also to Paragraph 38, Volume 7, R. C. L., under the title "Courts".

The case of Donovan vs. Pennsylvania Railroad Company, 199 U. S. 278, decides all points raised in this suit against the contention of the Appellant, except one question of fact, which has been decided against it both by the District Court and the Circuit

Court of Appeals. This Court is, therefore, committed to the correctness of the points insisted on by Appellee. All steps taken by Appellee from the inception of this suit have been based upon the principles announced in the Donovan case.

The Kentucky Court of Appeals has said that such a contract as that in controversy in invalid. But the same Court has also held that a corporation, and particularly the Louisville & Nashville Railroad Company, one of the parties to the contract in controversy, has, in addition to its special powers, implied authority to do all acts necessary for the full and complete utilization of its special powers which are not expressly or impliedly excluded by the terms of the grant. It has been held by that court that a railroad company, as an incident to its business, has the right to engage in the operation of a hotel and other similar activities. This was so held in the case of Louisville Property Company vs. Commonwealth, 146 Ky. 847 ; 143 S. W. 412. The Court of Appeals of Kentucky in that case recognizes that a railroad company, aside from the transportation of freight and passengers, may use its individual property as it pleases so as to make money for itself. In this respect that decision is in harmony with the decision in the Donovan case, supra. If a railroad company, aside from its transportation business, which may be regulated by law, should be deprived of the right to use its private property as an individual might use his private property, it would be to deprive it of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the

United States. It is by reason of the implied authority which a railroad company has to use its private property as it pleases when the use does not relate to its transportation business, that it may rent part of its depot and building for news stands, restaurants, barber shops, and other like conveniences. If it may do this, it may lease to a taxicab company its grounds so that the employees of such company may come thereon and solicit business. It has the authority to keep off of its premises any person not having any business with the railroad company who desires to use the property of the railroad company for his own personal gain.

If these principles are sound, and they have been recognized as sound by this Court, and impliedly by the Kentucky Court of Appeals in the case last cited from that court, it follows that the contention of Appellee is correct. And the railroad could not be deprived of its authority to enter into the contract in controversy without also depriving it of rights guaranteed by the Constitution of the United States and amendments thereto.

III. Is Contract in Excess of the Charter of the Railroad Company?

We do not follow the reasoning of counsel for Appellant on this point. Certainly there is nothing in the authorities which they cite to support them. The charter of the Louisville & Nashville Railroad Company is a private act of the Legislature of Kentucky, and courts do not take judicial knowledge of private acts but they must be proven as any other fact. That the Louisville and Nashville Railroad

Company does have an implied authority under its charter to enter into contracts such as the one in controversy is established by the opinion in the case of Louisville Property Company against Commonwealth, supra.

IV. The Contract is not Violative of Section 214, Kentucky Constitution.

Section 214, Kentucky Constitution, has no application to this case. The Court of Appeals of Kentucky has had similar contracts before it and in no opinion has that court held or intimated that Section 214, Kentucky Constitution, has any bearing on such a contract. Section 214 prohibits the making of preferential contracts relating to the conduct of its business as a common carrier. The contract entered into between Appellee and the Louisville & Nashville Railroad Company was not made by the railroad company for the conduct of its business as a common carrier. The Circuit Court of Appeals answered the argument of Appellant in a way satisfactory to us, and we can add nothing to what is found in that opinion. The contract in controversy was entered into by the railroad company under its implied authority as determined in the Louisville Property Company case, supra. The authorities cited by counsel for Appellant on this point, that is, the Stockyards cases, show conclusively that Section 214 of the Constitution did not mean what Appellant now contends should be the construction of it. We concede that a railroad company can not make a preferential contract relating to its transportation business, and that is all that the authorities relied on by Appellant hold.

V. WAS EXTENDING INJUNCTION TO CURD STREET ERROR?

This is a question of fact decided adversely to Appellant by the District Court and by the Court of Appeals. The point is well disposed of by the opinion of the Circuit Court of Appeals. No right is denied Appellant by the injunction in so far as it relates to Curd Street.

VI. CONCLUSION

In the conclusion of their brief counsel for Appellant quote and rely upon Section 202 of the Constitution of Kentucky. There is no discrimination in favor of domestic corporations or in favor of foreign corporations involved in the contract in controversy. A foreign corporation would have the same rights in the State Courts that a domestic corporation would have, and a domestic corporation would have the same rights in the Federal Courts that a foreign corporation would have. They are on an exact equality. If one goes to the State Courts and another to the Federal Courts, the result of the litigation may be different but it is not because one is a domestic corporation and the other a foreign corporation.

Respectfully submitted,

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